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In the Supreme Court of the United States

OCTOBER TERM, 1975

EASTERN KENTUCKY WELFARE RIGHTS ORGANIZATION, ET AL., PETITIONERS
v.
WILLIAM E. SIMON, SECRETARY OF THE TREASURY, ET AL.

WILLIAM E. SIMON, SECRETARY OF THE TREASURY, ET AL., PETITIONERS
v.
EASTERN KENTUCKY WELFARE RIGHTS ORGANIZATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF THE TREASURY, ET AL.

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EASTERN KENTUCKY WELFARE RIGHTS ORGANIZATION, ET AL., PETITIONERS

v.

WILLIAM E. SIMON, SECRETARY OF THE TREASURY, ET AL.

No. 74-1124

WILLIAM E. SIMON, SECRETARY OF THE TREASURY, ET AL., PETITIONERS

v.

EASTERN KENTUCKY WELFARE RIGHTS ORGANIZATION, ET AL.

ON WRIT OF CERTIORARI TO THE UNITED STATES COURT OF APPEALS FOR THE DISTRICT OF COLUMBIA CIRCUIT

BRIEF FOR THE SECRETARY OF THE TREASURY, ET AL.

OPINIONS BELOW

The opinion of the district court (Pet. App. A 1A-26A)[1] is reported at 370 F. Supp. 325. The opinion of the court of appeals (Pet. App. B 31A-57A) is reported at 506 F.2d 1278.

JURISDICTION

The judgment of the court of appeals was entered on October 9, 1974 (Pet. App. C 59A-60A). On December 6, 1974, the court denied a petition for rehearing by Eastern Kentucky Welfare Rights Organization, and also denied its suggestion of rehearing *en banc*, with three dissents (Pet. App. D 61A-67A). On December 30, 1974, the Chief Justice extended the time for the Secretary of the Treasury to file a petition for a writ of certiorari to and including March 8, 1975. Eastern Kentucky's petition (No. 74-1110) was filed on March 6, 1975. The Secretary of the Treasury's petition (No. 74-1124) was filed on March 8, 1975. Both petitions were granted and the cases consolidated on May 19, 1975 (A. 176-177). The jurisdiction of this Court rests on 28 U.S.C. 1254(1).

QUESTIONS PRESENTED

No. 74-1124. Whether the federal courts may review the correctness of Revenue Rulings and other similar administrative determinations made by the

[1] "Pet. App." refers to the petition for a writ of certiorari filed on behalf of William E. Simon, Secretary of the Treasury, *et al.*, in No. 74-1124.

Department of the Treasury, in equity suits brought by persons whose own tax liabilities are not at issue.

If the foregoing question is answered affirmatively, there are two additional questions presented in No. 74-1110:

1. Whether a Revenue Ruling issued by the Secretary of the Treasury—providing that a hospital is entitled to tax exemption if it furnishes emergency care for all persons regardless of their ability to pay but otherwise ordinarily limits admission to those who can pay their hospitalization costs, either themselves, through private health insurance, or with the aid of public programs such as Medicare—correctly interprets Section 501(c)(3) of the Internal Revenue Code of 1954, which accords tax-exempt status to organizations organized and operated exclusively for "charitable" purposes.

2. Whether the Secretary's promulgation of the Revenue Ruling was exempt from the notice and hearing requirements of the Administrative Procedure Act, 5 U.S.C. 553, because the Ruling was an "interpretative rule."

STATUTES AND REGULATIONS INVOLVED

The relevant provisions of Sections 170(c)(2)(B), 501(c)(3), 7801 and 7802 of the Internal Revenue Code of 1954, 26 U.S.C., the Declaratory Judgment Act, 28 U.S.C. 2201 and 2202, the Administrative

Procedure Act, 5 U.S.C. 553(b)(3) and (c), and Treasury Regulations on Income Tax (1954 Code), Section 1.501(c)(3)-1(d)(2) are set forth in Appendix A, *infra*, pp. 1a-5a.

STATEMENT

1. This class action was brought in the United States District Court for the District of Columbia by a number of national and regional nonprofit health and welfare organizations and several individuals on behalf of all persons who are unable to pay for the costs of hospital care. The complaint alleged that the Secretary of the Treasury and the Commissioner of Internal Revenue erroneously recognized as tax exempt under Section 501(c)(3) of the Internal Revenue Code of 1954, private, nonprofit hospitals that do not render a complete range of free or below-cost service to indigents (A. 25-29).

Petitioners [2] sought broad declaratory and injunctive relief "declaring the rights of poor people to receive services without charge from private hospitals which receive federal tax exemptions as 'charitable' institutions under 28 [*sic*] U.S.C. 501(c)(3), and restraining and enjoining [the Treasury officials] from granting or continuing to grant tax exemptions to private hospitals which refuse admis-

[2] "Petitioners" refers to Eastern Kentucky Welfare Rights Organization, *et al.*, the plaintiffs in the district court and petitioners in No. 74-1110. Respondents in No. 74-1110 and petitioners in No. 74-1124, William E. Simon, Secretary of the Treasury, *et al.*, will be referred to as "the Treasury" or "the Treasury officials."

sion and free services to persons unable to pay * * *" (A. 10). Petitioners also sought an injunction requiring the Treasury to withdraw the eligibility of such hospitals for rulings recognizing their tax-exempt status under Section 501(c)(3) of the Code, and the deductibility of contributions to them under Section 170(c)(2), 26 U.S.C. (*ibid.*).

2. This suit resulted from the publication by the Commissioner of Internal Revenue on November 3, 1969, of Rev. Rul. 69-545, 1969-2 Cum. Bull. 117, Appendix B, *infra*, pp. 6a-18a, which sets forth the Internal Revenue Service's position with regard to the exempt status of nonprofit hospitals. This Revenue Ruling stated the conclusions of the Internal Revenue Service as to whether nonprofit hospitals, designated Hospital *A* and Hospital *B*,[3] qualified for

[3] Revenue Rulings characteristically refer to taxpayers in this manner to preserve anonymity. They also adopt other conventions to avoid identification of the taxpayer or taxpayers who may have been the recipients of private letter rulings on which the Revenue Rulings were based. Each issue of the Internal Revenue Bulletin and each volume of the Cumulative Bulletin contains in its Introduction a statement identical with, or similar to, the statement that appeared in the Introduction to 1969-2 Cum. Bull. xxii: "Revenue Rulings represent the conclusions of the Service on the application of the law to the entire state of facts involved. In those that are based on positions taken in rulings to taxpayers or technical advice to service field offices, identifying details and confidential information are deleted to prevent unwarranted invasions of privacy and to comply with statutory requirements, such as 18 U.S.C. 1905 and 26 U.S.C. 7213 concerning disclosure of information obtained from members of the public."

exemption from federal income tax under Section 501(c)(3) of the Internal Revenue Code of 1954.

The facts set forth in the Ruling with respect to Hospital *A* were as follows: It was controlled by a board of trustees composed of independent civic leaders. It maintained an open medical staff, with staff privileges available to all qualified physicians. Staff physicians could lease office space at the hospital office building at rates comparable to commercial rates in the area.

Hospital *A* operated a full-time emergency room, and no one requiring emergency care was denied treatment regardless of ability to pay. Otherwise, it ordinarily limited its admissions to those who could pay the cost of their hospitalization, either themselves, or through private health insurance, or with the aid of public programs such as Medicare. However, patients who could not meet the financial requirements for admission were ordinarily referred to another hospital in the community that did serve indigent patients.

On these facts, the Service concluded that the purpose and activity of Hospital *A*, apart from its related educational and research purposes and activities, were to provide hospital care, and thus the promotion of health, on a nonprofit basis for members of its community. The Revenue Ruling held, therefore, that Hospital *A* was organized and operated in furtherance of a purpose considered to be "charitable" so as to be exempt from federal income tax under Section 501(c)(3) of the Code.

The facts concerning Hospital *B*, the other hospital considered in the Ruling, were as follows: It had originally been owned by five doctors. The doctors formed a nonprofit organization and sold their interests in the hospital to the organization at fair market value. The board of trustees of the nonprofit organization consisted of the five doctors, their accountant and their lawyer. The five doctors also comprised the hospital's medical committee, which controlled admission of other doctors to the medical staff. In five years of operation of the hospital by the nonprofit organization, the medical committee granted staff privileges to only four other doctors and had rejected applications of a number of qualified doctors in the community.

Hospital *B* restricted admission to patients of the doctors holding staff privileges, and ordinarily to those who could pay the cost of services rendered. Patients of the five original doctor-owners accounted for a large majority of hospital admissions over the years. Those five doctors continued to maintain their offices in the hospital, and paid rent which was less than commercial rates for comparable quarters. No office space was made available for any other staff member. The hospital maintained an emergency room, but on a relatively inactive basis, and primarily for the convenience of the staff doctors' patients. Hospital *B* had instructed local ambulance services to take emergency cases to other hospitals in the area.

On these facts, the Revenue Ruling held that Hospital *B* was operated for private benefit and, accordingly, did not qualify for exemption from federal income tax under Section 501(c)(3) of the Code.

In concluding that Hospital *A* qualified for exemption, Rev. Rul. 69-545 modified in part the requirements that had been previously published as Rev. Rul. 56-185, 1956-1 Cum. Bull. 202, Appendix B, *infra*, pp. 13a-18a. In the earlier Ruling, the Internal Revenue Service concluded that for a hospital to qualify for exemption (*id.* at 203):

> It must be operated to the extent of its financial ability for those not able to pay for the services rendered and not exclusively for those who are able and expected to pay. The fact that its charity record is relatively low is not conclusive that a hospital is not operated for charitable purposes to the full extent of its financial ability. It may furnish services at reduced rates which are below cost, and thereby render charity in that manner. It may also set aside earnings which it uses for improvements and additions to hospital facilities. It must not, however, refuse to accept patients in need of hospital care who cannot pay for such services.

3. In this action, petitioners alleged that Rev. Rul. 69-545 was an erroneous interpretation of Section 501(c)(3), and that the Commissioner's issuance of the Ruling had resulted in their inability to receive medical care from tax-exempt hospitals by "encouraging such hospitals to deny their services to individual PLAINTIFFS and the class to which they belong

* * *" (A. 25). They further alleged that the Ruling was void because it had not been issued in accordance with the rule-making provisions of the Administrative Procedure Act, 5 U.S.C. 553, requiring a public hearing and an opportunity for interested and affected persons to be heard (A. 26). Accordingly, petitioners requested a judicial declaration that the Treasury officials had acted unlawfully in recognizing the tax-exempt status of private hospitals that did not admit and provide free or below-cost medical care to indigents (A. 25-26).

Petitioners also sought an injunction requiring the Commissioner of Internal Revenue to revoke his recognition of the tax-exempt status of hospitals that did not serve persons unable to pay or those covered by Medicaid and to collect all taxes due from such hospitals (A. 27-28). Petitioners further requested an injunctive order against the Commissioner that all private hospitals which desired to attain or retain recognition as tax exempt be required "to file specific data, on forms devised by the DEFENDANTS * * *, and approved by this Court, * * * verifying that [such] hospitals do afford service to persons unable to pay, do not discriminate against * * * Medicaid [patients], do not require a deposit as a condition for admission * * *, and do not attempt to collect payment for persons determined to be too poor to pay for services" (A. 28). Finally, petitioners requested a declaration that the Commissioner lacked the legal authority to issue Rev. Rul. 69-545, which recognized the tax-exempt status

of hospitals which do not provide non-emergency treatment to persons unable to pay the costs, either themselves or through private health insurance or Medicare (A. 29).

4. The Treasury officials moved to dismiss the complaint on the ground that the court lacked jurisdiction (A. 31-32). The district court denied the motion to dismiss without opinion (A. 33). Subsequently, upon the parties' cross-motions for summary judgment, the district court granted summary judgment for petitioners. It held that the court had jurisdiction to determine whether Rev. Rul. 69-545 was erroneous and that petitioners had standing to maintain the action. The court further held that the Revenue Ruling was invalid. In view of that holding, the court did not reach petitioners' contention that the Ruling was void because it was not issued in accordance with the notice and hearing provisions of the Administrative Procedure Act (Pet. App. A 1A-26A).

The district court substantially granted the declaratory and injunctive relief requested by petitioners. It declared that Rev. Rul. 69-545 was void to the extent it modified the prior Ruling with respect to the requirement that hospitals provide care for patients without charge or at below-cost rates. The court thereupon enjoined the Treasury officials from recognizing the tax-exempt status of private hospitals unless they: (1) were operated, to the extent of their financial ability, for those not able to pay for services; (2) furnish such "charitable" services on

a below-cost or no-charge basis; (3) did not refuse patients in need of hospital care who cannot pay.

In addition, the court ordered the Treasury officials to prepare notices subject to the approval of the court, and required exempt hospitals or applicants for exemption to post such notices, which would state that exemption had been applied for or granted and explain the free or below-cost requirement of the prior Rev. Rul. 56-185. Finally, the court ordered the Treasury officials to "take the necessary and immediate steps to implement this Order, including * * * revoking the voided portion of Revenue Ruling 69-545 and promulgating in its stead appropriate Rulings," and also to "report their progress to the Court within 60 days * * *" (Pet. App. A 27A-29A).[4]

Pursuant to the district court's direction, on April 1, 1974, the Treasury officials submitted a report to

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[4] On February 6, 1974, the government moved in the district court for a stay of the injunctive provisions of the order pending appeal because of the broad adverse impact upon the administration of the exempt organization tax provisions. On February 21, 1974, the district court denied the motion without opinion (A. 6).

Five days later, the government sought a stay of injunctive relief from the court of appeals. In support of the application, the government filed a supplemental memorandum in which it advised the court that the indefinite status of Rev. Rul. 69-545 was delaying and impeding the orderly issuance of letter rulings to hospitals, and in several instances had jeopardized municipal bond issues for hospital purposes. On March 26, 1974, the court of appeals denied the motion for a stay and placed the case on an accelerated briefing and argument schedule (A. 170-171).

that court of the progress in implementing its order. Appendix C, *infra*, pp. 19a-30a. The report included a proposed Revenue Ruling and Revenue Procedure which were designed to carry out the injunctive order. On April 10, 1974, petitioners filed a memorandum opposing the Treasury officials' compliance program. Their opposition requested, *inter alia*, that the court order the Treasury officials to revise the exemption ruling application form and to require hospitals to furnish more detailed information annually to the Internal Revenue Service. Appendix D, *infra*, pp. 31a-37a. However, the district court has never acted upon either the Treasury officials' progress report or petitioners' opposition with respect to the nature or timing of the requested relief.

5. The court of appeals sustained the district court's holding with respect to jurisdiction. It concluded that the federal courts may review the correctness of Revenue Rulings and other similar administrative determinations made by the Department of the Treasury and grant equitable relief to persons whose own tax liabilities are not at issue (Pet. App. B 36A-43A).

However, a divided court of appeals reversed the judgment of the district court with respect to the merits of petitioners' claim. It held that Rev. Rul. 69-545 was not inconsistent with the legislative intent of Section 501(c)(3) and that the Treasury's modification of its prior Revenue Ruling was proper. The court of appeals also held that the Revenue Ruling was interpretative, so that it was not subject

to the notice and hearing provisions of the Administrative Procedure Act, and that promulgation of the Ruling did not constitute an abuse of discretion (Pet. App. B 45A-56A).

SUMMARY OF ARGUMENT

I

A

1. In 1969, the Commissioner of Internal Revenue published Rev. Rul. 69-545, which sets forth the Internal Revenue Service's position with regard to the exempt status of nonprofit hospitals. The Ruling concluded that a hospital is entitled to tax exemption if it furnishes emergency care for all persons, regardless of their ability to pay, but otherwise limits admission to those who can pay their hospital admission costs, either themselves, through private health insurance, or with the aid of public programs such as Medicare. This Ruling modified an earlier Ruling which had concluded that a tax-exempt hospital must be operated to the extent of its financial ability for those not able to pay.

Acting on behalf of all persons unable to pay for the costs of hospital care, petitioners brought this action seeking restoration and enforcement of the previously outstanding Ruling with respect to the tax-exempt status of private hospitals. In so doing, petitioners hope, through the mechanism of this suit, to effect a change in what they perceive as the present hospital policies governing the extent to which pri-

vate hospitals furnish medical care for the indigent. Petitioners thus seek to use the Internal Revenue laws to effect a broad transformation in the social structure.

2. The federal courts have no jurisdiction to entertain a suit challenging the Treasury's tax treatment of third parties brought by persons whose own tax liabilities are not at issue. In the context of this case, where petitioners seek to compel the revocation of a published Revenue Ruling, the continued effectiveness of the Treasury's entire rulings program is at stake. Under this program, the Internal Revenue Service issues each year approximately 40,000 advance letter rulings setting forth its opinion concerning the federal tax consequences of specific proposed transactions. From the thousands of letter rulings it issues each year, the Service selects and edits several hundred for publication in its Bulletin in more abstract and anonymous form as Revenue Rulings. The aim of this publication program is to inform subordinate officials, taxpayers and their representatives of the established policies of the Internal Revenue Service.

Thus, the published Revenue Rulings and letter rulings programs instruct the public with respect to the application of the technical provisions of the Internal Revenue Code, contribute in large measure to uniformity of interpretation of the tax law and thereby enhance public compliance with the revenue statutes. Moreover, by establishing a reliable procedure for the dissemination of advance information, the

Revenue Rulings program promotes the stability of our self-reporting tax system by reducing controversies and litigation. In this respect, the Internal Revenue Service is unique. No other agency of the federal government maintains such an ambitious and wide-ranging program of making known its current interpretative opinions respecting the statute it administers.

By concluding that the courts are empowered to exercise review authority over published Revenue Rulings in equity suits brought by persons whose own tax liabilities are not at issue, the jurisdictional holding of the court of appeals discourages the Internal Revenue Service from making public its views on questions arising under the tax statutes. It invites anyone who disagrees with a letter ruling or a published Revenue Ruling to sue the responsible Treasury officials to enjoin them from taking any action consistent with the Ruling. Moreover, in holding that a Revenue Ruling can be judicially revoked retroactively simply on the basis of another view of the law, the decision below has impaired the element of reliance inherent in the rulings system and thereby has greatly reduced the effectiveness of this program of tax administration. If the federal courts could generally order the retroactive revocation of a Revenue Ruling at the behest of persons whose own tax liabilities are not at issue, the elimination of predictability of result would unquestionably increase the number of controversies and litigated cases, thereby multiplying the burdens upon the courts.

3. The present Internal Revenue Code and its predecessor Revenue Acts reveal a consistent congressional intent to vest the administration of the tax laws exclusively in the Department of the Treasury. From the very inception of the Treasury as the tax-collecting arm of the federal government, Congress has vested in its officials broad discretion in the enforcement of the revenue laws. An early taxing statute enacted in 1792 directed the Secretary of the Treasury to administer the revenue laws "as he shall judge best." Similarly, the current statutory provisions cast the authority of the Secretary of the Treasury and the Commissioner of Internal Revenue in the broadest possible terms, and include the power to prescribe all needful rules, make assessments, bring suits for the collection of taxes, make refunds, and compromise both civil and criminal cases.

For example, Section 6406 of the Code provides that the findings of fact and decisions on the merits of the Secretary or his delegate in allowing claims for refund shall not be subject to review by any other federal administrative or accounting officer. Pursuant to the predecessor of this statutory directive, this Court long ago repeatedly held that no other officer of the federal government may sue to recover a refund allowed by the Commissioner of Internal Revenue within the exercise of his exclusive jurisdiction over the administration of the tax laws. The proposition that private parties, such as petitioners, should not be able to set aside the decision of the

Commissioner not to tax a particular group of hospitals follows *a fortiori* from these decisions.

4. The broad authority that Congress has given the Secretary of the Treasury and the Commissioner of Internal Revenue over the administration of the tax laws shows that it intended to vest the administration of the revenue laws exclusively in the Executive Branch and did not intend the courts to entertain suits of this kind. If one person could bring an action against the Treasury objecting to the tax treatment accorded another person, the courts would quickly be drawn into performing the tax administration function reserved to the Executive Branch. Indeed, if petitioners can maintain this action, there are many others who could utilize litigation with the Internal Revenue Service as a sword to be wielded against adversaries. For example, such litigation might be brought to compel the Service to audit a particular taxpayer according to standards that the plaintiffs insisted were required by the statute rather than those employed by the Service. The institution of such suits would require the Treasury to channel its energies in the pursuit of questions deemed important not by it but by a host of private plaintiffs who claim to assert the public interest but who have no ultimate responsibility for tax administration.

Thus, in *Louisiana* v. *McAdoo*, 234 U.S. 627, the Court dismissed a similar suit by the State of Louisiana, itself a producer of sugar, seeking an order compelling the Secretary of the Treasury to collect higher duties on imported sugar. It observed that

the maintenance of such actions "would operate to disturb the whole revenue system of the Government" and that "[i]nterference [by the courts] in such a case would be to interfere with the ordinary functions of government" (234 U.S. at 632, 633). The same reasoning applies here.

B

1. The impropriety of the entertainment by the courts below of petitioners' challenge to the Commissioner's Revenue Ruling is also shown by their lack of standing to maintain such an action. This result is indicated by *Linda R.S.* v. *Richard D.*, 410 U.S. 614, which held that the plaintiff, the mother of an illegitimate child, had no standing to maintain an action to enjoin the "discriminatory application" of a state statute which provided a criminal penalty for the failure of a father to support his children, based upon the claim that the district attorney refused to take action because, in his view, the fathers of illegitimate children were not within the scope of the statute. The Court ruled that "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another" (410 U.S. at 619).

The principle of *Linda R.S.* is fully applicable here and requires dismissal of this suit. Just as the plaintiff in *Linda R.S.* had no standing to contest the prosecution of the father of her child, petitioners here have no standing to challenge the Treasury's decision not to tax certain hospitals described in

Rev. Rul. 69-545. There is no meaningful difference between the Secretary of the Treasury's role in enforcement of the Internal Revenue Code and the role of other prosecutors whose judgment has remained free from judicial control.

2. Moreover, here, as in *Linda R.S.*, the likelihood that a ruling in the plaintiff's favor would ultimately provide the relief sought could "at best, be termed only speculative" (410 U.S. at 618). Petitioners have not shown that the change in the tax-exempt status of hospitals which petitioners seek to accomplish by their attack on the Revenue Ruling would result in the provision of medical care for the indigent. Like the father of the illegitimate child who may prefer to go to jail rather than pay support, a hospital might well elect to forego its tax-exempt status. This is especially true in light of the fact that private philanthropy has declined to only about 4 percent of the revenue of private hospitals.

C

This suit is also barred by the Anti-Injunction and the Declaratory Judgment Acts. The former provision states that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *." The Declaratory Judgment Act bars any declaratory suit "with respect to Federal taxes."

1. The court of appeals held that the bar of the Anti-Injunction Act was not applicable to this case because petitioners do not seek to restrain the "assessment or collection" of any tax, but rather seek to in-

crease the amount of taxes which would be paid by any hospital which does not provide a full range of medical services for the indigent. But this ruling ignores this Court's statement in *State Railroad Tax Cases*, 92 U.S. 575, 613, that the Act was intended to prevent judicial interference "with the *process* of collecting the taxes on which the government depends for its continued existence" (emphasis supplied). The "process" of tax collection by the Department of the Treasury includes the making of administrative determinations such as the Revenue Ruling at issue here. Moreover, the word "restrain" in the Anti-Injunction Act does not necessarily limit the Act's application to those suits seeking to "lower" or "reduce" tax collections, since that word means "to limit or restrict * * * a particular action or course." Since petitioners seek to limit the Commissioner's policy regarding the tax-exempt status of hospitals to the test promulgated in the prior Revenue Ruling, they do in fact seek to "restrain" the process of assessment and collection of taxes within the meaning of the Anti-Injunction Act.

2. Even assuming, *arguendo*, that the Anti-Injunction Act does not bar this suit, petitioners' attempt to obtain a judicial declaration with respect to the tax liabilities of various hospitals and their contributors falls within the broader statutory prohibition of the Declaratory Judgment Act which bars any declaratory suit "with respect to Federal taxes." The conclusion of the court of appeals that the Declaratory Judgment Act is "coterminous" with the Anti-

Injunction Act fails to take account of the words of that statute and its legislative history and misreads the applicable precedents. The decisions of the lower federal courts have applied the Declaratory Judgment Act prohibitions to analogous nontaxpayer suits respecting the federal tax liabilities of other parties.

D

Petitioners' complaint should have been dismissed for the additional reason that it is an unconsented suit against the United States and is barred by sovereign immunity. A suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration," *Land* v. *Dollar*, 330 U.S. 731, 738, or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act," *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 704. Although the named defendants in this suit are the Secretary of the Treasury and the Commissioner of Internal Revenue, petitioners are not suing them in their individual capacities but are seeking to require them to perform certain actions in their official capacities as administrators of the federal tax laws. Thus, the suit is against the sovereign under the standard of *Hawaii* v. *Gordon*, 373 U.S. 57, because "the order requested would require the * * * [Secretary's] official affirmative action, [and] affect the public administration of government agencies" (*id.* at 58).

The court of appeals erroneously concluded that sovereign immunity did not bar this action because: (a) petitioners were challenging the authority of the

Commissioner of Internal Revenue to interpret a revenue statute in a manner contrary to established congressional policy, and (b) the Administrative Procedure Act constitutes a waiver of sovereign immunity.

(a) In *Larson* v. *Domestic & Foreign Corp.*, *supra*, this Court recognized that suits against officers are not suits against the sovereign if the officer allegedly has acted beyond his statutory powers or if the statute under which he acts is alleged to be unconstitutional. Neither exception is applicable to this case. Petitioners do not complain that the Secretary or the Commissioner acted unconstitutionally or beyond their statutory powers, but only that the Commissioner has made an erroneous interpretation of the term "charitable" in Section 501(c)(3) of the Code. Accordingly, this case falls within the well-established rule that an Executive official's performance of a statutory duty to interpret the law is an action of the sovereign which the courts may not enjoin unless Congress has consented to such a suit.

(b) The second reason of the court of appeals—that the viability of the sovereign immunity doctrine is open to question after the enactment of the Administrative Procedure Act in 1946—is also incorrect. The Administrative Procedure Act does not waive the United States' sovereign immunity, and six courts of appeals have so held. Although three circuits, including the court below, have taken the contrary view, those decisions cannot be squared with the statement of this Court in *Blackmar* v. *Guerre*, 343 U.S. 512, 515-516, that "[s]till less is the [Administrative Procedure] Act to be deemed an implied waiver of all governmental immunity from suit."

If the Court agrees with the foregoing submission, that is the end of the matter and the judgment of the court of appeals should be reversed and the case remanded to the district court with directions to dismiss the complaint for lack of jurisdiction. If, however, the Court disagrees with our jurisdictional argument, it will then have to consider the questions presented in No. 74-1110, which are discussed below in Points II and III.

II

1. The Secretary's Revenue Ruling that a hospital is entitled to exemption from income taxes if it furnishes emergency care for all persons regardless of their ability to pay correctly interprets the term "charitable" in Section 501(c)(3) of the Internal Revenue Code. This exemption for "charitable" organizations antedates the enactment of the modern income tax. At no time, however, did Congress attempt precisely to define "charitable" but left the compass of that statutory term for the Secretary of the Treasury to define in his administration of the tax laws.

As the court of appeals correctly noted, it is well established that the term "charitable" may be defined more broadly than merely relief of the poor. Although the Treasury Regulations under the 1939 Code predecessor provision of Section 501(c)(3) specified "relief of the poor" as the applicable charitable

requirement, the current Regulations, which were adopted in 1959 after hearing, expanded that definition to provide that the term "charitable" must be used in its generally accepted legal sense, which is not limited to its popular meaning of benevolence to the poor. See *Green* v. *Connally*, 330 F. Supp. 1150, 1159 (D. D.C.), affirmed *per curiam sub nom. Coit* v. *Green*, 404 U.S. 997.

The evolution of the "charitable" concept in the law of trusts and the Regulations' reference to the meaning of "charitable" in its accepted legal sense demonstrates the correctness of Rev. Rul. 69-545. While certain early charitable trust cases required charitable hospitals to accept all patients regardless of their ability to pay, most recent trust cases involving hospitals recognize that in certain circumstances the promotion of health is a charitable purpose, separate and apart from any requirement of free service to the poor.

The evolution of the tax law has proceeded along similar lines. While service to the poor was given more emphasis in the Treasury's initial administration of the charitable standard, several early decisions upheld tax-exempt status on a broader concept of the term "charitable." The 1959 Regulations were a formal recognition by the Treasury that free care for the indigent would no longer be given exclusive emphasis.

2. There are sound reasons underlying the Commissioner's modification of his Ruling on hospitals. Unlike the situation early in our nation's history, when the hospital as an institution was an alms-

house for the poor supported by private philanthropy, the hospital today is the primary community health facility for rich and poor alike. Since 1953, when the Commissioner issued his first Revenue Ruling, there have been two dramatic changes in the financing of health care delivery. First, hospital costs have risen to astronomical proportions, placing private hospitals in precarious financial straits. Second, the development of both private and public health insurance (Medicare and Medicaid) has largely displaced self-paying patients and private philanthropy as the principal source of hospital revenue. The institution of these public assistance programs since the publication of the first Revenue Ruling has resulted in the admission and treatment by private hospitals of large numbers of insured persons of whom a substantial percentage, in the absence of such governmental reimbursement, would be unable to pay hospitalization costs. Thus, a private hospital which meets the criteria of the current Revenue Ruling and admits any patient with some form of health insurance, is accepting many of those persons who would have required free or below-cost care in 1956. As a result, the free care for indigents required by the prior Revenue Ruling is of lesser significance for the health care of the poor today than it was in 1956.

Finally, the indigent care requirement of the prior Revenue Ruling, which petitioners seek to have restored to universal application, proved to be administratively unworkable in practice. The standard of that Ruling for ascertaining a hospital's ability to provide health care to the poor—"to the extent of its

financial ability"—is virtually impossible to apply fairly. Even if a hospital has surplus funds available, its "financial ability" to furnish free services cannot be measured meaningfully against its need for new technological equipment or training programs. Under the financial ability test of the old Ruling, the Internal Revenue Service presumably would have to determine how much a hospital should spend for free care and how much for other crticial needs, a task for which it is singularly ill-equipped. However, the standards implicit in the current Revenue Ruling are less likely to involve the Treasury in formulating guidelines with respect to details of hospital administration.

III

The court of appeals correctly held that Rev. Rul. 69-545 was not subject to the notice and hearing requirements of the Administrative Procedure Act because it came within the Section 553(b)(3)(A) exception for "interpretative rule[s]." As that court observed, it is well settled that agency rulings that do not bind the affected parties or the courts are interpretative within the meaning of Section 553(b)(3)(A). Unlike the cases relied upon by petitioners, which involve substantive agency orders with binding legal effect, the published Revenue Ruling at issue here is only an interpretation by the Treasury of the statutory term "charitable." Such a ruling is informational in character and represents an announcement of position in much the same way as a speech by a Treasury official or an argument presented to a court.

ARGUMENT

I. THE FEDERAL COURTS MAY NOT REVIEW THE CORRECTNESS OF REVENUE RULINGS MADE BY THE DEPARTMENT OF THE TREASURY IN EQUITY SUITS BROUGHT BY PERSONS WHOSE OWN TAX LIABILITIES ARE NOT AT ISSUE

A. Congress Has Vested The Administration Of The Revenue Laws Exclusively In The Department Of The Treasury

1. *Introduction*

The jurisdictional question in No. 74-1124, presented by the petition of the Secretary of the Treasury, is of paramount importance to the orderly administration of the revenue laws. In holding that a federal court, at the behest of persons whose own tax liabilities are not at issue, can review the correctness of a Revenue Ruling issued by the Treasury and enjoin its implementation if it concludes that the Ruling is erroneous, the court of appeals has arrogated to the Judicial Branch the function of administering the tax laws which Congress has vested exclusively in the Executive Branch in the Department of the Treasury.

While Congress has prescribed various procedures for judicial review by taxpayers of Treasury determinations of their tax liability,[5] no taxes of any

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[5] Congress has established a statutory scheme which generally provides taxpayers with two methods of obtaining judicial review of tax disputes with the Treasury. First, with respect to income, estate, and gift taxes, a taxpayer may obtain review of a notice of deficiency without having to pay the disputed amount by filing a timely petition in the Tax

organization or person are directly at issue in this case. To the contrary, petitioners seek to compel revision of the current criteria of the Department of the Treasury under which private hospitals are accorded tax-exempt status. In so doing, petitioners hope, through the mechanism of this suit, to change what they perceive as the present hospital policies governing the extent to which private hospitals furnish medical care for the indigent. Petitioners thus seek to use the Internal Revenue laws to effect a broad transformation in the social structure.

As we shall demonstrate, the courts have no jurisdiction to entertain such a suit. Indeed, the broad nature of petitioners' requested relief—compelling the Treasury to revoke an outstanding Revenue Ruling, to issue another ruling in its stead, and to revoke the tax-exempt status of all hospitals whose activities do not conform to petitioners' interpretation of the term "charitable" in Section 501(c)(3) of the Internal Revenue Code of 1954—requires the judiciary to play an unprecedented role in the administration of the revenue laws, which is generally reserved by statutory provisions to the Executive Branch under congressional supervision. As this Court has had occasion during the last decade to

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Court. Sections 6212 and 6213 of the Code. Alternatively, a taxpayer may pay the disputed amount of any type of tax, file a claim for refund, and obtain judicial review of the Commissioner's denial of the claim (or his failure to act on the claim within six months) by a suit for refund in a district court or in the Court of Claims. Sections 6532 and 7422 of the Code; 28 U.S.C. 1346 and 1491.

observe in the context of two refund suits (*United States* v. *Correll*, 389 U.S. 299, 306-307; *Bingler* v. *Johnson*, 394 U.S. 741, 750-751), but in terms equally applicable to petitioners' claim for judicial revision of the Commissioner's ruling—

> [W]e do not sit as a committee of revision to perfect the administration of the tax laws. Congress has delegated to the Commissioner, not to the courts, the task of prescribing "all needful rules and regulations for the enforcement" of the Internal Revenue Code. 26 U.S.C. § 7805(a). In this area of limitless factual variations, "it is the province of Congress and the Commissioner, not the courts, to make the appropriate adjustments." *Commissioner* v. *Stidger*, 386 U.S. 287, 296.

2. The role of the rulings program in tax administration

Petitioners' attempt to compel the revocation of a published Revenue Ruling, if successful, would seriously impair the effectiveness of the Treasury's entire rulings program. Each year, in response to formally submitted requests, the Internal Revenue Service issues approximately 40,000 advance letter rulings setting forth its opinion concerning the federal tax consequences of specific proposed transactions. In most circumstances, the issuance of a ruling gives the affected taxpayers sufficient indication of the tax effects of a transaction so that they can consummate it.

Many of these letter rulings, as contemplated by Section 508(a) of the Internal Revenue Code of 1954,

are issued to organizations desiring recognition of their tax-exempt status under Section 501(c)(3) of the Code, as "organized and operated exclusively for religious, charitable * * * or educational purposes." In those instances, the Commissioner has stated that generally contributions to such organizations will be considered deductible under Section 170(a) of the Code, as long as the ruling is outstanding, even if it is subsequently revoked retroactively. Rev. Proc. 72-39, 1972-2 Cum. Bull. 828.

Of the thousands of letter rulings it issues each year, the Internal Revenue Service selects and edits several hundred for publication in its Bulletin in more abstract and anonymous form as Revenue Rulings. The aim of this publication program is to inform subordinate revenue officials, taxpayers and their representatives of the established policies of the Internal Revenue Service.[6] Thus, the published rulings program, which is designed to instruct the public with respect to the application of the technical provisions of the Internal Revenue Code, contributes in large measure to uniformity of interpretation of the tax law and thereby enhances public compliance with the revenue statutes. Moreover, by establishing a reliable mechanism of advance information, the Revenue Rulings program promotes the stability of our self-reporting tax system by reducing contro-

[6] This is the stated purpose of the Revenue Rulings system. See Rev. Rul. 2, 1953-1 Cum. Bull. 484; Rev. Rul. 212, 1953-2 Cum. Bull. 449.

versies and litigation.[7] In this respect, the Internal Revenue Service is unique. No other agency of the federal government maintains such an ambitious and wide-ranging program of making known its current interpretive opinions respecting the statute it is charged to administer.

Although the present Revenue Rulings and letter rulings programs are the product of an administrative reorganization in 1953,[8] the issuance of in-

[7] The Commissioner has the power to revoke a Revenue Ruling or a letter ruling retroactively if it is contrary to law. See Section 7805(b) of the Code; *Automobile Club of Michigan* v. *Commissioner*, 353 U.S. 180; *Dixon* v. *United States*, 381 U.S. 68, 71; Introduction, 1969-2 Cum. Bull. xxii. However, in order to encourage reliance upon published Revenue Rulings, it is the announced policy of the Internal Revenue Service ordinarily to make revocation of such Rulings prospective only. Rev. Proc. 72-1, 1972-1 Cum. Bull. 693, 694. In the case of a letter ruling, the policy of the Service is that it will generally revoke or modify it retroactively only if there has been a misrepresentation or an omission of a material fact in the application for the ruling. See Section 13, Rev. Proc. 72-3, 1972-1 Cum. Bull. 698, 705-706. Moreover, if the Internal Revenue Service intends to revoke or modify its recognition of an organization's tax-exempt status, there is a prescribed procedure of formal notice and hearings. See Rev. Proc. 72-4, 1972-1 Cum. Bull. 706; *Bob Jones University* v. *Simon*, 416 U.S. 725, 730. For a general description of the entire rulings program, see Rogovin, *The Four R's: Regulations, Rulings, Reliance and Retroactivity*, 43 Taxes 756 (1965); and Caplin, *Taxpayer Rulings Policy of the Internal Revenue Service*, 20 N.Y.U. Fed. Tax Inst. 1 (1962).

[8] In 1953, the various types of opinions, such as General Counsel's Memoranda (G.C.M.'s) and Solicitor's Opinions (Sol. Op.'s), were consolidated into a single category known as Revenue Rulings. Revenue Procedures (Rev. Proc.'s) con-

terpretive rulings by the Treasury has been an essential part of its administration of the revenue laws from the earliest days of the Republic. When the Department of the Treasury was established and the office of Secretary of the Treasury was created by the Act of September 2, 1789, 1 Stat. 65, Section 2 of that Act provided that it was "the duty of the Secretary of the Treasury * * * to superintend the collection of the revenue." See currently Revised Statutes, Section 248, 31 U.S.C. 1002. By 1792, Secretary Hamilton had already addressed "Circulars" to collectors instructing them in the "true construction" of the revenue acts.[9] These directives by the first Secretary of the Treasury primarily served as internal instructions to his subordinates.

Subsequently, synopses of such administrative opinions were published (see, *i.e.*, Treasury Department, Synopsis of Decisions (1868)) and gradually the number and types of opinions increased.[10] The available

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tinue to be issued by the Service but they deal with matters of internal procedures rather than substantive tax law. See Rev. Proc. 55-1, 1955-2 Cum. Bull. 897.

[9] One such "Circular" dealt with the proper leakage allowance for purposes of the taxes on distilled spirits and molasses. See Circular of August 27, 1792, reproduced in *The Work and Jurisdiction of the Bureau of Internal Revenue*, p. 9 (Government Printing Office, 1948).

[10] See, for example, the various types of published Rulings listed in 1952-1 Cum. Bull. v-vi. In addition, opinions of the Attorney General sometimes served the same purposes as published Revenue Rulings. See *e.g.*, 39 Ops. A.G. 261-266 (March 18, 1939); 25 Ops. A.G. 605-607 (May 7, 1906); 24 Ops. A.G. 1-8 (March 12 and 19, 1902); 1 Ops. A.G. 345-346

records show that at least as early as 1913, the Internal Revenue Service (then the Bureau of Internal Revenue) maintained a policy of answering taxpayers' questions concerning interpretations of tax statutes. By 1938, there was considerable public sentiment to make such responses binding upon the Service.

As a result, Congress authorized the Service to enter into closing agreements with respect to prospective transactions which would fix their tax consequences for the pertinent years. See Section 801, Revenue Act of 1938, 52 Stat. 573. Because this procedure proved cumbersome, the Internal Revenue Service established the present letter rulings program in 1953, which in practical terms accomplished much the same result without the necessity for formal closing agreements.[11] See Rev. Rul. 10, 1953-1 Cum. Bull. 488.

As the foregoing history indicates, the effectiveness of the rulings program is in large measure attributable to the high degree of reliance the public has placed upon letter rulings and Revenue Rulings reflecting the position of the Treasury with respect to

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(March 31, 1820); 1 Ops. A.G. 269-270 (April 15, 1819). On occasion, such opinions were included in Internal Revenue compilations. See, *e.g.*, T.D. 3570, III-1 Cum. Bull. 85 (1924), considered in *Squire* v. *Capoeman*, 351 U.S. 1, 8-9, n. 14.

[11] Although the Commissioner has the power to revoke a Revenue Ruling or a letter ruling retroactively, it is the announced policy of the Internal Revenue Service ordinarily to make such revocations prospective only in order to encourage taxpayer reliance. See n. 7, *supra*.

questions arising under the Internal Revenue Code. While the rulings program is primarily designed to provide information to the public, as a practical matter it represents the announced word of the government that it will generally adhere to a particular statutory interpretation or tax policy until further notice. In holding that a revenue ruling should be revoked retroactively simply on the basis of another view of the law, the decision of the district court has impaired the element of reliance inherent in the rulings system and has thereby greatly reduced the effectiveness of this program of tax administration. If the federal courts could generally order the retroactive revocation of a Revenue Ruling at the behest of persons whose own tax liabilities were not at issue, the consequences would be three-fold. First, the elimination of predictability of result would unquestionably increase the number of controversies and litigated cases, thereby multiplying the burdens upon the courts. Second, it would impose uncertainty upon a large number of financial transactions in which the tax consequences were at all unclear, thereby impairing the incidence of normal commercial transactions. Third, as this case demonstrates, it would to some extent reduce the ability of organizations to represent with certainty their tax-exempt status to prospective donors.

By concluding that the courts are empowered to exercise general reviewing authority over published Revenue Rulings, the jurisdictional holding of the court of appeals discourages the Internal Revenue

Service from making public its views on questions arising under the tax statutes. It invites anyone who disagrees with a letter ruling or a published Revenue Ruling to sue the responsible Treasury officials to enjoin them from taking any action consistent with the Ruling. One would suppose that such a radical departure from accepted norms would not have been made without specific congressional authorization for such judicial review of the actions of the properly constituted federal tax officials.

There is, however, no such statutory authorization. To the contrary, an examination of the pertinent provisions of the present Internal Revenue Code and its predecessor Revenue Acts, to which we now turn, reveals a consistent congressional intent to vest the administration of the tax laws exclusively in the Department of the Treasury.

3. *The statutory provisions governing tax administration vest broad discretion in the Secretary of the Treasury*

The administration of the revenue laws in general, and the implementation of the Revenue Rulings and letter rulings programs in particular, necessarily require the exercise of a wide latitude of judgment by the responsible officials of the Department of the Treasury.[12]

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[12] For example, in Rev. Proc. 72-9, 1972-1 Cum. Bull. 719, the Internal Revenue Service has announced a list of those areas in which it will not issue advance rulings or determination letters.

It is therefore hardly surprising that from the very inception of the Treasury as the tax-collecting arm of the federal government, Congress has vested in its officials broad discretion in the enforcement of the revenue laws. Pursuant to its authority under the Constitution to "lay and collect Taxes, Duties, Imposts and Excises" (Article I, Section 8), Congress provided in 1792 that "the Secretary of the Treasury shall direct the superintendence of the collection of the duties on impost and tonnage *as he shall judge best.*" Act of May 8, 1792, 1 Stat. 280, Section 6 (emphasis supplied). The congressional debates surrounding the creation of the office of the Secretary of the Treasury indicate that some members of Congress were fearful of giving such broad powers to a single individual, especially when the Constitution mentioned no such office. See 1 Annals of Congress, pp. 384-389 (1834).

However, the grant of such broad authority proved successful. Thus, in 1862, when Congress reimposed internal taxes, it created a second office of Commissioner of Internal Revenue, who was "charged, under the direction of the Secretary of the Treasury, with preparing all the instructions, regulations, directions * * *, and all other matters pertaining to the assessment and collection of the duties, stamp duties, and taxes, which may be necessary to carry this act into effect * * *." See Act of July 1, 1862, 12 Stat. 432-433.[13]

[13] Originally, the Act of May 8, 1792, 1 Stat. 280, Section 6, established the office of Commissioner of the Revenue. However, that office was abolished by Section 2 of the Act of April 6, 1802, 2 Stat. 148, upon its repeal of the internal taxes. The office was again created by the Act of July 24, 1813, 3 Stat. 39, Section 1, coincident with the reimposition of internal taxes, and again abolished upon their repeal by the Act of December 23, 1817, 3 Stat. 401.

Similarly, the current statutory provisions cast the authority of the Secretary of the Treasury and the Commissioner of Internal Revenue in the broadest possible terms. Thus, for example, Section 7801 of the Internal Revenue Code of 1954 provides that "Except as otherwise expressly provided by law, the administration and enforcement of [the revenue laws] shall be performed by or under the supervision of the Secretary of the Treasury." Section 7802 is the present statutory basis for the Commissioner of Internal Revenue, who "shall have such duties and powers as may be prescribed by the Secretary."[14]

[14] Section 3901(a) of the 1939 Code had provided generally that "The Commissioner, under the direction of the Secretary * * * (1) [s]hall have general superintendence of the assessment and collection of all taxes imposed by any law providing internal revenue." This derived from Revised Statutes, Section 321, 31[illegible] U.S.C. 1002, and, ultimately, from the Act of June 30, 1862, 13 Stat. 223. Other more specific grants of authority in the 1939 Code, as in earlier Revenue Acts, were principally either to the Commissioner (*e.g.*, Sections 3614, 3640), or to the Commissioner with the approval of the Secretary (*e.g.*, Sections 3743, 3760, 3761).

Reorganization Plan No. 26 of 1950, 64 Stat. 1280, Section 1, transferred "to the Secretary of the Treasury all functions of all other officers of the Department of the Treasury and all functions of all agencies and employees of such Department," and authorized the Secretary to make such provisions as he should deem appropriate authorizing the performance of

Complementing the authority vested in the Secretary of the Treasury and the Commissioner of Internal Revenue to administer and enforce the tax laws is their authority to make rules and regulations granted by Section 7805(a) of the Code. That provision, which dates at least as early as 1862 when the current office of Commissioner was established, states that "Except where such authority is expressly given by this title to any person other than an officer or employee of the Treasury Department, the Secretary or his delegate [the Commissioner] shall prescribe all needful rules and regulations for the enforcement of this title * * *."[15] This discretionary rule-making responsibility requires a high degree of technical competence and understanding of the complex interrelationships of the taxing provisions of the Code, coupled with the wisdom that only the long

functions by any other officer, agency, or employee of the Department. See also Reorganization Plan No. 1 of 1952, 66 Stat. 823. The Secretary in turn delegated to the Commissioner the direct responsibility for the operations of the Bureau of Internal Revenue, now the Internal Revenue Service. Treasury Dept. Order No. 150-2, May 15, 1952 (Annual Report of the Secretary of the Treasury 1951-1952, p. 485). Section 7804 of the Internal Revenue Code of 1954 makes the provisions of these Reorganization Plans applicable to all functions vested by the Code. See generally H.R. Rep. No. 1337, 83d Cong., 2d Sess. A438-A439 (1954); S. Rep. No. 1622, 83d Cong., 2d Sess. 620-621 (1954).

[15] In addition, the Code contains a number of specific grants of authority to the Secretary to make what are often designated as "legislative" Regulations. *Ilfeld Co.* v. *Hernandez*, 292 U.S. 62, 65. See, *e.g.*, Sections 167(b), 1502.

institutional experience of the Internal Revenue Service can give. Thus, the Code properly centralizes the rule-making function in the Commissioner of Internal Revenue. See Paul, *Taxation in the United States*, pp. 665-666 (1954); Eisenstein, *Some Iconoclastic Reflections on Tax Administration*, 58 Harv. L. Rev. 477, 526-527 (1945).

Other statutory grants of authority to the Treasury are equally as broad and have their roots in provisions long antedating the modern income tax. Section 6201(a) gives to the Secretary or his delegate the vital and sweeping authority "to make the inquiries, determinations, and assessments of all taxes * * * imposed by this title." This provision was intended to vest exclusively in the office of the Commissioner the responsibility and authority for enforcement in its three separate aspects: inquiries, determinations and assessments. It was a conscious choice on the part of the Congress to concentrate such responsibility and authority in a single official.[16] Furthermore, to make it clear that this responsibility is not to be shared, Section 7401 of the Code provides that "No civil action for the collection or recovery of taxes * * * shall be commenced unless the Secretary or his delegate authorizes or sanctions

[16] Section 6201 originated in the Act of December 24, 1872, 17 Stat. 402, Section 2, and abolished the offices of assessor and assistant assessor. The predecessor of Section 6201 was recommended by Commissioner Douglass in his *Report of the Commissioner of Internal Revenue for the Fiscal Year ended June 30, 1872*, p. xix.

the proceedings and the Attorney General or his delegate directs that the action be commenced".[17]

Finally, the Code also gives the Commissioner of Internal Revenue comprehensive responsibility and authority to refund or credit taxes erroneously or illegally collected (Section 6402),[18] to compromise civil or criminal cases arising under the internal revenue laws (Section 7122),[19] to enter into final and conclusive (absent fraud, malfeasance or misrepresentation) closing agreements with respect to tax liability for past or prospective transactions (Section 7121),[20] and to abate excessive, erroneous

[17] Section 7401 of the 1954 Code originated in Section 9 of the Act of July 13, 1866, 14 Stat. 101, 111. Previously, the Collectors had been authorized to initiate suits for the recovery of taxes. Act of July 1, 1862, 12 Stat. 44, Section 31. The reference to the Attorney General originated in Section 3740 of the 1939 Code and reflected Section 5 of Executive Order No. 6166 of June 10, 1933, which vested in the Attorney General and the Department of Justice the authority to conduct the government's tax litigation other than before the Board of Tax Appeals.

[18] This provision, carried forward from Sections 322(a), 1027(a), and 3770(a) of the 1939 Code, originated in Section 44 of the Act of June 30, 1864, 13 Stat. 239.

[19] This provision, carried forward from Section 3761 of the 1939 Code, also originated in Section 44 of the Act of June 30, 1864, *supra*.

[20] This provision, carried forward from Section 3760 of the 1939 Code, originated in Section 606 of the Revenue Act of 1928, 45 Stat. 874, where it related only to taxable periods ending prior to the date of the agreement. Section 801 of the Revenue Act of 1938, 52 Stat. 573, eliminated the restriction to prior periods.

or illegal assessments (Section 6404).[21] Absent fraud or mistake in mathematical calculation, Section 6406 provides that the findings of fact and decision on the merits of the Secretary or his delegate in allowing claims for refund shall not be subject to review by any other administrative or accounting officer of the United States.[22]

Pursuant to the predecessors of this latter statutory directive, this Court has long ago held that absent fraud or mistake appearing on the record, no other officer of the federal government may seek to recover a refund allowed a taxpayer by the Commissioner of Internal Revenue within the exercise of his exclusive statutory discretion over the administration of the tax laws. *United States* v. *Kaufman*, 96 U.S. 567; *United States* v. *Savings Bank*, 104 U.S. 728; *United States* v. *Louisville*, 169 U.S. 249. Accord: *Woolner* v. *United States*, 13 Ct. Cl. 355; *United States* v. *Detroit Steel Products Co.*, 20 F.2d 675 (E.D. Mich.); *Sybrandt* v. *United States*, 19 Ct. Cl. 461. The proposition that private parties, such as

[21] This provision, carried forward from Section 3770(a)(5) of the 1939 Code, originated in Section 44 of the Act of June 30, 1864, *supra*.

[22] This provision, carried forward from Section 3790 of the 1939 Code, originated in Section 1007 of the Revenue Act of 1924, 43 Stat. 340. It had been recommended by a representative of the Treasury Department in 1921 (Statement by Dr. T. S. Adams, Senate Hearing on Internal Revenue, September 15, 1921). It was enacted in 1924 specifically to make it clear that the allowance of tax refunds was not subject to review by the Comptroller General. H.R. Conf. Rep. No. 844, 68th Cong., 1st Sess. 31 (1924); 65 Cong. Rec. 7141 (1924).

petitioners, should not be able to set aside the action of the Commissioner with respect to a particular taxpayer or group of taxpayers follows *a fortiori* from these decisions.

4. *This suit is not appropriate for judicial resolution*

a. The broad authority that Congress has given the Secretary of the Treasury and the Commissioner of Internal Revenue over the administration of the tax laws shows that it did not intend the courts to entertain suits of this kind. Nothing in the Internal Revenue Code or any other act of Congress suggests that Congress ever intended the courts to have general review authority over the administration of the revenue laws other than their jurisdiction to hear deficiency or refund suits brought by taxpayers contesting their liability. The statutory system implements James Madison's concept that the role of the Judicial Branch in the tax area is to consider "the claims and accounts subsisting between the United States and particular citizens" (1 Annals of Congress, *supra*, at 612).[23] See also *id.* at 386-389, 592-602, 612-614.

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[23] Indeed, even within the context of a refund suit, the Court has indicated that review of the Commissioner's discretion is necessarily limited. In *Williamsport Co.* v. *United States*, 277 U.S. 551, the taxpayer argued that the Commissioner should have made a special assessment based upon the average tax of representative corporations. The Court refused to review the Commissioner's decision not to make such a special assessment, stating (pp. 560-561):

> It is true that where the Commissioner's action is reviewable judicially, his findings of fact in making an assessment, as distinguished from his determinations involving administrative discretion * * * are commonly reviewable by courts in appropriate proceedings * * *. But such problems involve primarily the situation of a single taxpayer, and the controlling data can easily be made available to the court. Here, the considerations * * * are facts * * * which can only be known to an official or a body having wide experience in such matters and ready access to the means of information.

If there is any limitation on the authority of the Executive Branch over tax administration, it is the oversight exercised by Congress through the Joint Committee on Internal Revenue Taxation (see Sections 8001, 8002, 8021 and 8022 of the Code) [24] and through the various committees responsible for the enactment of the tax legislation and government operations.[25] Thus, pursuant to its constitutional power

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[24] See also Section 6405(a) of the Code, which provides that the Commissioner shall make no refund or credit of tax in excess of $100,000, until the expiration of 30 days from the submission of an explanatory report to the Joint Committee on Internal Revenue Taxation.

[25] The administration of the tax law has been the subject of a number of legislative hearings and reports. See, *e.g.*, Prevention of Tax Avoidance, Preliminary Report of a Subcommittee of the Committee on Ways and Means, 73d Cong., 2d Sess. (1933); Proposals for Strengthening Tax Administration, Hearings before a Subcommittee of the Committee on Ways and Means, 82d Cong., 2d Sess. (1952). Indeed, the very substantive issue in this case—the tax-exempt status of hospitals—was the subject of a Staff Report to the Senate Committee on Finance on Medicare and Medicaid, 91st Cong., 1st Sess. (1970) (A. 38-46). Finally, we are advised by the Internal Revenue Service that during the period January 1974, through June 1975, the Commissioner of Internal Revenue made 29 appearances before congressional committees in connection with legislative inquiries into Internal Revenue Service policies.

to "lay and collect Taxes," Congress has subjected the Department of the Treasury to the supervision inherent in the political process.

Given the constitutional and statutory commitment to vest the administration of the revenue laws exclusively in the Executive Branch, this suit to compel the Treasury to change its policy regarding the tax-exempt status of hospitals is not appropriate for judicial resolution. If one person could bring an action against the Treasury objecting to the tax treatment accorded another person, the courts would quickly be drawn into performing the tax administration function reserved to the Executive Branch. Indeed, if petitioners can maintain this action, there are many others who could utilize litigation with the Internal Revenue Service as a sword to be wielded against adversaries.

Such litigation could be brought to compel the Internal Revenue Service to audit a particular taxpayer according to standards that the plaintiff insisted were required by the statute rather than those employed by the Service. One business could sue to compel the imposition of a heavier tax burden on a competitor. The institution of such suits would require the Treasury to channel its energies in the pursuit of questions deemed important not by it but by a host of private plaintiffs who claim to assert the public interest but who have no ultimate responsibility for tax administration. This would deprive the Treasury of the discretion and flexibility necessary to collect the taxes which this Court has characterized as "the life-blood of government". *Bull* v. *United States*, 295 U.S. 247, 259. Moreover, such suits would "create the potential for abuse of the judicial process, distort the role of the Judiciary in its relationship to the Executive and the Legislature and open the Judiciary to an arguable charge of providing 'government by injunction'." *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208, 222.

Of course, we do not suggest that policies of the Internal Revenue Service should be immune from public inquiry and examination. The broad tax policy questions raised by petitioners' suit are properly a matter for public debate. However, the appropriate forum for such a debate concerning the correctness of Treasury policy is in the Congress pursuant to the exercise of its oversight of the Department of the Treasury and not in the courts. "Any other conclusion would mean that the Founding Fathers intended to set up something in the nature of an Athenian democracy or a New England town meeting to oversee the conduct of the National Government by means of lawsuits in federal courts." *United States* v. *Richardson*, 418 U.S. 166, 179.

b. This is not the first instance in which this Court has been asked to require the Treasury to increase the tax burden of others who were not even parties to the litigation. In *Louisiana* v. *McAdoo*, 234 U.S. 627, the State of Louisiana; itself a producer of sugar, sought an order requiring the Secretary of the Treasury to collect higher duties on im-

ported sugar.[26] As in the instant case, the Secretary's construction (T.D. 34241, 26 Treas. Dec. (Customs) 332) of the relevant statutes was analogous to a Revenue Ruling, and as was often the case, was in accordance with an Opinion of the Attorney General (30 Ops. A.G. 259 (1914)) (see n. 10, *supra*).

In dismissing the suit, the Court refused to consider the merits of Louisiana's claim challenging the statutory discretion of the Secretary. It observed that the maintenance of such actions "would operate to disturb the whole revenue system of the Government" (234 U.S. at 632) and that "[i]nterference [by the

[26] In *Louisiana* v. *McAdoo, supra*, the Court was well aware of the unprecedented nature of the suit. As Solicitor General Davis stated in the government's brief in that case (October Term, 1913, Orig., p. 10), "From 1789 to 1890 there is no record of any attempt to review the decision of a collector or of the Secretary where the rate of duty imposed was alleged to be too low, and no such right exists at this time."

In 1922, Congress enacted a limited statutory exception to the general rule established in *Louisiana* v. *McAdoo, supra*. It allowed domestic manufacturers to intervene in proceedings to establish the value and tax classification of imported goods. Act of September 21, 1922, 42 Stat. 970, Section 516. However, the courts have uniformly held that, apart from cases arising under the Section 516 manufacturers' protest statute, they have no jurisdiction to entertain third-party suits challenging an allegedly too favorable tax treatment of another. *Feltex Corp.* v. *Dutchess Hat Works*, 71 F.2d 322, 328 (Cust. & Pat. App.); *Fletcher* v. *United States*, 92 F.2d 713, 717 (Cust. & Pat App.); *Calf Leather Tanners' Ass'n* v. *Morgenthau*, 80 F.2d 536 (C.A. D.C.); *Morgantown Glassware Guild* v. *Humphrey*, 236 F.2d 670 (C.A. D.C.); see also *J. C. Penney Co.* v. *United States Treasury Dept.*, 439 F.2d 63 (C.A. 2), certiorari denied, 404 U.S. 869.

courts] in such a case would be to interfere with the ordinary functions of government" (*id.* at 633).[27]

Earlier, in *Dorsheimer* v. *United States*, 7 Wall. 166, the Court dismissed a suit brought by a collector of internal revenue and two informers for their then-existing statutory right to one-half of an amount received by the government as a penalty or forfeiture in the compromise of a liquor tax violation. The compromise approved by the Secretary of the Treasury had waived the fraud penalty and thereby eliminated the plaintiffs' reward. In holding that the Secretary's remission of the penalty was not reviewable, the Court stated that "[i]t was the exercise of his discretion in a matter intrusted to him alone, and from which there could be no appeal" (*id.* at 175).

Thus, even though the plaintiffs suffered a direct financial detriment as a result of the Secretary's action, his discretion to lessen the tax burden of a particular taxpayer could not be challenged in the courts. Similarly, the Executive's policy concerning the cri-

[27] Petitioners make little effort to distinguish the force of *Louisiana* v. *McAdoo*, stating (Br. 59) that it rests "on an outdated notion of standing" and that "it has long been overruled." But the Court has cited *Louisiana* v. *McAdoo* without question or disapproval in *Dalehite* v. *United States*, 346 U.S. 15, 34, n. 30; *Aircraft & Diesel Corp.* v. *Hirsch*, 331 U.S. 752, 763, n. 18; *Switchmen's Union* v. *Board*, 320 U.S. 297, 303; *Arizona* v. *California*, 298 U.S. 558, 572; *Oregon Basin Oil & Gas Co.* v. *Work*, 273 U.S. 660, 661; and *Johnson* v. *McAdoo*, 244 U.S. 643. It was also cited in dissenting opinions in *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 710, n. 2, 716, 729, and in *Anti-Fascist Committee* v. *McGrath*, 341 U.S. 123, 204-205.

teria for the tax-exempt status of hospitals—a policy that lessens the taxes of a particular class—is not an appropriate subject for review by the Judicial Branch.[28]

c. Finally, there is another aspect of this case that demonstrates that it is not appropriate for judicial resolution. Petitioners seek a judgment that will revoke Rev. Rul. 69-545 and determine that an unidentified hospital, Hospital *A*, and other hospitals that may to some undefined extent be similarly situated, are not exempt from federal income tax under Section 501(c)(3) of the Code. While the facts set forth in that Ruling are somewhat sparse, they do indicate that Hospital *A* was engaged in educational and research activities that might become highly relevant in establishing its exempt status, even if it did not make its facilities generally available to the indigent. Suppose, for example, a hospital were organized for the treatment and research of a particular rare disease. If it restricted admissions to those persons so affected, the fact that it did not admit any indigent persons would not appear to jeopardize its exempt status as an educational or scientific organization. The district court's revocation of Rev. Rul.

[28] See also *Wolkstein* v. *Port of New York Authority*, 178 F. Supp. 209 (D. N.J.), holding that a suit to enjoin the Commissioner's recognition of the tax-exempt status of the Port of New York Authority was barred by Section 7401 of the Code, which vests in the Attorney General the sole authority to bring suits at the request of the Commissioner for the collection of taxes. Accord: *United States ex rel. Roberts* v. *Western Pac. R. Co*, 190 F.2d 243, 248 (C.A. 9).

69-545 and the contrary disposition by the court of appeals, which focus upon only the single factor of treatment of the indigent, will therefore not necessarily control the status of a single identifiable hospital. Even if the court of appeals had affirmed the district court in all respects, each hospital would have remained free to litigate its own right to exemption on its own particular facts. Under these circumstances, the judgments of the courts below with respect to the hypothetical facts of the two Revenue Rulings amount to little more than advisory opinions which no federal court is constitutionally authorized to render.

B. Petitioners Have No Standing To Challenge The Treasury's Revenue Ruling

1. The impropriety of the court's entertainment of petitioners' challenge to the Commissioner's Revenue Ruling is also shown by their lack of standing to maintain such an action. This Court has consistently held that the Article III limitation to "cases" and "controversies" requires a party seeking judicial relief to possess a specific interest in the outcome of the controversy. This requirement is designed to insure that the issues will be presented "in an adversary context and in a form historically viewed as capable of judicial resolution," *Sierra Club* v. *Morton*, 405 U.S. 727, 732, and will involve something more than "generalized grievances about the conduct of government or the allocation of power in the Federal System," *Flast* v. *Cohen*, 392 U.S. 83, 106. See also

United States v. *Richardson*, 418 U.S. 166; *Schlesinger* v. *Reservists to Stop the War*, 418 U.S. 208.

While recent decisions of this Court have somewhat broadened the categories of injury that may be alleged in support of standing, the Court also has recently observed that it has "steadfastly adhered to the requirement that, at least in the absence of a statute expressly conferring standing, federal plaintiffs must allege some threatened or actual injury resulting from the putatively illegal action before a federal court may assume jurisdiction" (footnote and citations omitted). *Linda R.S.* v. *Richard D.*, 410 U.S. 614, 617. There, the plaintiff, the mother of an illegitimate child, brought an action to enjoin the "discriminatory application" of a state statute which provided a criminal penalty for the failure of a father to support his children. Although the plaintiff asserted that she had made application to the local district attorney for enforcement of the statute against the father of her illegitimate child, the district attorney refused to take action because, in his view, the fathers of illegitimate children were not within the scope of the statute. Despite the plaintiff's interest in her child's support, the Court dismissed her suit for lack of standing because, *inter alia*, "a private citizen lacks a judicially cognizable interest in the prosecution or nonprosecution of another" (410 U.S. at 619).

The principle of *Linda R.S.* is fully applicable here and requires dismissal of this suit. The Court there noted (410 U.S. at 619) that its prior de-

cisions "consistently hold that a citizen lacks standing to contest the policies of the prosecuting authorities when he himself is neither prosecuted or threatened with prosecution." See *Younger* v. *Harris*, 401 U.S. 37, 42; *Bailey* v. *Patterson*, 369 U.S. 31, 33; *Poe* v. *Ullman*, 367 U.S. 497, 501. Just as the plaintiff in *Linda R.S.* had no standing to contest the nonprosecution of the father of her child, petitioners here have no standing to challenge the Treasury's decision not to tax certain hospitals described in Rev. Rul. 69-545. As this Court has often held, one charged with the task of prosecuting violations of a statute must possess the discretion both to prosecute and to refrain from doing so. See, *e.g.*, *Confiscation Cases*, 7 Wall. 454; *Federal Trade Commission* v. *Klesner*, 280 U.S. 19, 25; *Vaca* v. *Sipes*, 386 U.S. 171, 182. Accord: *Georgia* v. *Mitchell*, 450 F.2d 1317 (C.A. D.C.); *Powell* v. *Katzenbach*, 359 F.2d 234 (C.A. D.C.), certiorari denied, 384 U.S. 906; *Peek* v. *Mitchell*, 419 F.2d 575 (C.A. 6). But compare *Bachowski* v. *Brennan*, 502 F.2d 79, 86-88 (C.A. 3), reversed and remanded on other grounds *sub nom. Dunlop* v. *Bachowski*, No. 74-466, decided June 2, 1975 (slip op. 5-7).[29]

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[29] In *Bachowski* v. *Brennan*, 502 F.2d 79 (C.A. 3), reversed and remanded on other grounds *sub nom. Dunlop* v. *Bachowski*, No. 74-466, decided June 2, 1975, the court held that a disappointed union office seeker could invoke the judicial process to compel the Secretary of Labor to bring an action under Title IV of the Labor Management Reporting and Disclosure Act to set aside a union election. The court of appeals (502 F.2d at 86-88) rejected the Secretary's contention that

There is no meaningful difference between the Secretary of the Treasury's role in enforcing the Internal Revenue Code and the role of other prosecutors whose judgment has remained free from judicial control. Here, petitioners not only seek revocation of a published Revenue Ruling but also an injunction requiring the Commissioner to revoke his recognition of the tax-exempt status of hospitals that did not admit indigents and to collect the taxes from such hospitals (A. 27-28). But the Commissioner's legal conclusion as to what taxpayers to subject to audit and assessment of additional taxes surely rests within his discretion, and his decisions in this regard cannot be the subject of judicial review. Just as this Court in *Linda R.S.* was unwilling to review the decision of a local prosecutor that a certain class of individuals were not subject to prose-

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his decision was an unreviewable exercise of prosecutorial discretion, and this Court (slip op. at 6, n. 7) agreed with that disposition.

However, the court of appeals expressed the view that the doctrine of prosecutorial discretion should be limited to those civil cases which, like the criminal prosecutions, involve the vindication of a societal or governmental interest, rather than the protection of individual rights such as those of union members preserved by the Labor Management Reporting and Disclosure Act. Unlike that Act, the Internal Revenue Code does not direct the Secretary of the Treasury to protect or regulate any particular individual or group. The Code simply authorizes him to collect the taxes imposed on the nation as a whole. Thus, the Secretary's decision whether to determine a deficiency in taxes against a particular taxpayer involves the vindication of a governmental interest rather than the protection of rights accorded to an individual.

cution, the Secretary of the Treasury must similarly remain free to make his own legal conclusions as to which organizations are exempt from tax. Accordingly, petitioners should not be able to invoke the jurisdiction of the federal courts to compel the Treasury to adopt and enforce their construction of the term "charitable" in Section 501(c)(3) of the Code.

2. This Court's *Linda R.S.* decision rests upon another ground that equally demonstrates that petitioners lack standing. There, the plaintiff alleged the injury arising from the failure of her child's father to contribute support payments. But the Court observed that "the bare existence of an abstract injury meets only the first half of the standing requirement" (410 U.S. at 618). Although a decision that the statute also applied to the fathers of illegitimate children might have persuaded the father of the plaintiff's child to provide support, the Court concluded that such a prospect could "at best, be termed only speculative" (*ibid.*). The granting of the requested relief would have resulted only in the jailing of the child's father and not his payment of support. Thus, "the 'direct' relationship between the alleged injury and the claim sought to be adjudicated, which previous decisions of this Court suggest is a prerequisite of standing [was] absent in [that] case" (*ibid.*).

Here, too, petitioners have alleged in their complaint a number of instances in which indigent persons have been denied admission to private, tax-exempt hospitals (A. 17-24). They have also alleged

in conclusory terms that the Treasury's recognition of the tax-exempt status of such hospitals has "encouraged" such hospitals to deny their services to the indigent and, that "[a]s a result" of the Treasury's policy, the plaintiffs "have suffered and will continue to suffer injury in their opportunity and ability to receive hospital services * * *" (A. 25). But petitioners have alleged no facts from which it could reasonably be inferred that their injury resulted in any concrete or demonstrable way from the statutory violation they attribute to the Treasury. Indeed, petitioners have made no showing that the relief they seek would result in the admission of a single additional indigent person to a private hospital.[30]

First, nothing in the prior Rev. Rul. 56-185, which required that a tax-exempt hospital "be operated to the extent of its financial ability for those not able to pay * * *," and which petitioners seek to have reinstated, would prevent a private hospital from using its surplus funds for research or capital expenditures rather than for the admission of the

[30] Thus, the district court's conclusion (Pet. App. A 10A) that there was a demonstrable correlation between the Treasury's Revenue Ruling and petitioners' injury is erroneous. A closer examination of the complaint reveals a number of allegations of refusals by hospitals to admit persons eligible for Medicaid assistance (A. 17-18, 21-23). But the very Rev. Rul. 69-545, which petitioners seek to set aside, requires that a hospital admit patients whose care will be paid "with the aid of public programs such as Medicare" (1969-2 Cum. Bull. at 117). Petitioners' complaint would therefore appear to be more appropriately directed to several individual hospitals rather than to the validity of the Ruling policy.

indigent. Second, just as the plaintiff in *Linda R.S.* could not show a connection between prosecution of the father of her child and receipt of support payments, petitioners cannot demonstrate that the revocation or threatened revocation of a hospital's tax-exempt status would coerce it into providing medical care for the indigent. Like the father of the illegitimate child who may prefer to go to jail rather than pay support, a hospital might well elect to forego its tax-exempt status. This is especially true in light of the fact that private philanthropy has declined to only about four percent of the revenue of private hospitals. See American Association of Fund Raising Council, *Giving U.S.A.: 1973*, p. 34.

As the Court stated only last Term in *Warth* v. *Seldin*, No. 73-2024, decided June 25, 1975, in dismissing a similarly defective complaint for lack of standing—"[Petitioners] rely on little more than the remote possibility, unsubstantiated by allegations of fact, that their situation might have been better had respondents acted otherwise, and might improve were the court to afford relief" (slip op. 16). Absent the necessary allegations that the defendants' conduct is harming the plaintiff or threatening him with harm, there is no assurance that "there is a real need to exercise the power of judicial review in order to protect the interests of the complaining party" or that relief can be framed "no broader than required by the precise facts to which the court's ruling would be applied." *Schlesinger* v. *Reservists to Stop the War*, *supra*, 418 U.S. at 221, 222. Since petitioners

have not demonstrated that the Treasury's action has caused their alleged injury, their complaint should likewise have been dismissed.[31]

3. Despite the unprecedented nature of a suit against the Treasury to increase the taxes of persons not parties to the litigation and the absence of any statute creating such a private right of action, petitioners (Br. 49) simply rest their jurisdictional argument upon the "general principle that judicial review of administrative action is the rule and nonreviewability an exception which must be demonstrated by 'clear and convincing evidence' of legislative intent." In support of this proposition, petitioners rely upon various decisions of this Court holding that actions of certain administrative agencies were

[31] Nothing in *Association of Data Processing Service Organizations* v. *Camp*, 397 U.S. 150, relied upon by petitioners (Br. 59), is to the contrary. There, the plaintiffs alleged competitive economic injury to private business enterprise as a result of a ruling by the Comptroller of the Currency permitting national banks to sell data processing services. The Court recognized standing because the claims were "arguably * * * within the zone of interests protected by [Section 4 of the Bank Service Corporation Act, 12 U.S.C. 1861]" (397 U.S. at 156). Thus, that case turned on the fact that Congress had provided for the standing of competitors to maintain such an action. See *United States* v. *Richardson*, *supra*, 418 U.S. at 176, n. 9; *United States* v. *SCRAP*, 412 U.S. 669, 686, n. 13; *Linda R. S.* v. *Richard D.*, *supra*, 410 U.S. at 617, n. 3.

Here, on the other hand, no provision of the Internal Revenue Code creates such a private right of action or a protectable zone of interest. As we have pointed out, *supra*, pp. 27-49, Congress has vested the authority to represent the public interest in the enforcement of the revenue laws exclusively in the Department of the Treasury.

reviewable under the standing provision of Section 10(a) of the Administrative Procedure Act, now 5 U.S.C. 702. That statute provides that "A person suffering legal wrong because of agency action, or adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof."

However, neither the general principle of judicial review of the Administrative Procedure Act nor the cases cited by petitioners support the proposition that the courts can review the correctness of a Revenue Ruling in an equity suit brought by a person whose own tax liability is not at issue. Each of those cases turned on the Court's particularized inquiry into whether the relevant agency statute had in express or implied terms precluded judicial review or committed the challenged action entirely to administrative discretion. See 5 U.S.C. 701(a).[32] With respect

[32] Thus, for example, in *Barlow* v. *Collins*, 397 U.S. 159, the Court's holding was premised upon its conclusion that Congress intended the agency statute, the Food and Agriculture Act of 1965, to require the Secretary of Agriculture to protect the interests of tenant farmers (397 U.S. at 164), so that the Secretary's issuance of a regulation in derogation of those interests was held to be reviewable. Similarly, in *Abbott Laboratories* v. *Gardner*, 387 U.S. 136, 141, the Court's decision rested on its reading of the legislative history of the Food, Drug, and Cosmetics Act indicating that certain review procedures were designed to provide an additional remedy and were not intended to preclude pre-enforcement review of regulations issued by the Commissioner of Food and Drugs. Finally, in *Rusk* v. *Cort*, 369 U.S. 367, 379-380, the Court held that a person outside the United States who was denied a right to citizenship could bring a declaratory judgment action and was

to the administration of the tax laws, Congress has vested exclusive authority in the Secretary of the Treasury and has provided for judicial review of his actions only by persons whose own tax liabilities are at issue.[33] Thus, the Court's decisions with respect to the availability of judicial review of other agency actions under the provisions of other statutes therefore have no bearing on the jurisdictional question presented here.

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not confined to the review procedures of the Immigration and Naturalization Act. Again, the Court's holding was based upon its conclusion that the legislative history demonstrated that the Act's review procedures were applicable to those persons who had chosen to seek admission to the United States in order to prosecute their claim.

[33] Indeed, the Court has not construed the Administrative Procedure Act as requiring judicial review of all agency actions. In certain instances, the Court has held that agency actions were committed to agency discretion by statute within the meaning of the Administrative Procedure Act, 5 U.S.C. 701(a), and are accordingly not reviewable under that Act. See, *e.g.*, *Panama Canal Co.* v. *Grace Line*, 356 U.S. 309, 317; *Schilling* v. *Rogers*, 363 U.S. 666; *Arrow Transportation Co.* v. *Southern R. Co.*, 372 U.S. 658, 667; *Chicago & Southern Air Lines* v. *Waterman S.S. Corp.*, 333 U.S. 103; *United States* v. *Pink*, 315 U.S. 203, 229.

In *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, 410, the Court characterized the Administrative Procedure Act's exemption for matters "committed to agency discretion" as "a very narrow exception * * * applicable in those rare instances where 'statutes are drawn in such broad terms that in a given case there is no law to apply.' " The present case, however, is one of those rare instances. Unlike the situation in *Overton Park*, Congress has never prescribed the standards to be employed by the Treasury in determining whether a hospital is a "charitable" organization. See pp. 80-97, *infra*.

C. This Suit Is Barred By The Anti-Injunction And The Declaratory Judgment Acts

Apart from the evidence throughout the Internal Revenue Code that Congress has vested the administration of the tax laws exclusively in the Department of the Treasury so as to preclude suits challenging the tax treatment accorded to other parties, there are two specific statutory prohibitions against this type of equity suit. First, this suit is barred by the federal Anti-Injunction Act. Second, this action is prohibited by the Declaratory Judgment Act, 28 U.S.C. 2201, which bars any declaratory suit "with respect to Federal taxes."

1. *The Anti-Injunction Act.* The Anti-Injunction Act, 26 U.S.C. 7421(a), Appendix A, *infra*, p. 2a, provides with exceptions not here relevant, that "no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person * * *." The statute was enacted in 1867 [34] in order to prevent the same type of injunctive suit which had swept over the state taxation systems from similarly inundating the federal system. This Court thereafter quickly recognized the congressional policy which underlay the passage of the Act, namely, that if the courts exercised general injunctive power with respect to the collection of taxes, the very existence of government would be threatened. See *State Railroad Tax Cases*, 92 U.S. 575, 613;

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[34] The statute originated as Section 10 of the Act of March 2, 1867, 14 Stat. 475, and is now codified as Section 7421(a) of the Internal Revenue Code of 1954.

Cheatham v. *United States*, 92 U.S. 85, 89; *Snyder* v. *Marks*, 109 U.S. 189, 193-194. The barring of such suits is necessary to enable the Treasury Department effectively to discharge its duty of "superintend[ing] the collection of the revenue * * *" which the First Congress delegated to it. See Act of September 2, 1789, 1 Stat. 65, Section 2. This includes a wide variety of administrative acts, including the acceptance of tax returns for filing, audits of returns, and promulgation of Regulations and Revenue Rulings.

Recently, in *Bob Jones University* v. *Simon*, 416 U.S. 725, the Court reaffirmed the specific prohibition of the Anti-Injunction Act against equity suits interfering with the process of collecting taxes. There, a tax-exempt organization brought suit to enjoin the Commissioner's revocation of its exempt status. In holding that such a claim was barred by the Act, the Court stated that the language of the statute—"no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court * * *"—"could scarcely be more explicit" (416 U.S. at 736). As the Court pointed out (*id.* at 742), this literal reading of the Act was consistent with its earlier decisions during the first half century of the Act's existence, which applied the broad prohibition without regard to the character of the tax, the nature of the challenge, or the effect of collection upon the taxpayer. See *Snyder* v. *Marks*, *supra*; *Pacific Steam Whaling Co.* v. *United States*, 187 U.S. 447; *Dodge* v. *Osborn*, 240 U.S. 118.

The court of appeals held that the bar of the Anti-Injunction Act was not applicable to this case because petitioners do not seek to restrain the "assessment or collection" of any tax but rather seek to increase the amount of taxes which would be paid by any hospital which does not provide a full range of medical services for the indigent. But this ruling ignores this Court's statement in *State Railroad Tax Cases*, *supra*, 92 U.S. at 613, that the Act was intended to prevent judicial interference "with the *process* of collecting the taxes on which the government depends for its continued existence" (emphasis supplied). The "process" of tax collection by the Department of the Treasury includes the making of administrative determinations such as the Revenue Ruling at issue here. As the Tenth Circuit recently held in *Cattle Feeders Tax Committee* v. *Shultz*, 504 F.2d 462, the Anti-Injunction Act bars any suit by a nontaxpayer to enjoin the promulgation of Revenue Rulings which would affect the tax liability of others.

Moreover, the word "restrain" in the Anti-Injunction Act does not necessarily limit the Act's application to those suits seeking to "lower" or "reduce" tax collections, as petitioners contend (Br. 50-51). That term means "to limit or restrict to * * * a particular action or course * * *." See Webster's Third New International Dictionary, p. 1936. Since petitioners seek to limit the Commissioner's policy regarding the tax-exempt status of hospitals to the test promulgated in the prior Rev. Rul. 56-185, they do in fact seek to "restrain" the assessment and collec-

tion of taxes within the meaning of the Anti-Injunction Act.[35]

Indeed, the broad type of equitable relief which petitioners seek in this action is even more threatening to the orderly administration of the revenue laws than injunctive actions by taxpayers with respect to their own liabilities. While an injunctive action brought by an individual taxpayer attempts to affect the assessment and collection of his taxes alone, this suit seeks to alter a ruling of general application which would affect both the tax-exempt status of all private hospitals and their contributors. If the courts regularly entertained such challenges to the correctness of Revenue Rulings, by persons whose own tax liabilities were not at issue, it can hardly be doubted that the Treasury's activities in other more fruitful areas of enforcement would have to be curtailed, to the detriment of the revenue collections. See *Moore* v. *Miller*, 5 App. D.C. 413, 419, appeal dismissed, 163 U.S. 696.

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[35] In certain instances this suit, which seeks the imposition of a more stringent exemption standard, could decrease the tax liability of hospitals. Under Sections 512 and 513 of the Code, tax-exempt hospitals are not permitted to offset exempt function losses against taxable unrelated business income, such as from a pharmacy serving non-patients. See Rev. Rul. 68-375, 1968-2 Cum. Bull. 245, and Rev. Rul. 68-376, 1968-2 Cum. Bull. 246. Thus, if a hospital had exempt function losses and taxable unrelated business income and it lost its exemption as a result of this suit, its tax liability could be decreased because its otherwise nondeductible exempt function losses could then be used to offset all of its income. See Comment, 54 Va. L. Rev. 1532, 1548-1550 (1968).

It would be anomalous to impute to Congress the intent to bar injunctive actions by taxpayers who are directly affected by the collection of their tax liability but to permit nontaxpayers whose interests are far more tangential to enjoin the administrative determinations of the Treasury and thereby affect the tax liabilities of countless numbers of taxpayers. The prohibition of the Anti-Injunction Act against judicial interference with the actions of the tax collector should apply to both taxpayer and nontaxpayer alike.[36]

2. *The Declaratory Judgment Act.* This suit is also barred by the Declaratory Judgment Act, 28 U.S.C. 2201 (Appendix A, *infra*, p. 3a), which bars any declaratory suit "with respect to Federal taxes." Section 2202 expands this prohibition by providing that the statute applies to any "[f]urther necessary or proper relief based upon a declaratory judgment or decree * * *." The latter provision encompasses injunctions in aid of the declaration of rights, as well as the declaration itself. S. Rep. No. 1005, 73d Cong., 2d Sess. 6 (1934). Since petitioners seek a declaration as to the future tax liabilities of all hos-

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[36] Only Congress can modify the statutory proscription against nontaxpayer equity suits against the Internal Revenue Service. Thus, for example, Congress has recently enacted a statute, incorporated as Section 7476 of the Internal Revenue Code, allowing the Pension Benefit Guarantee Corporation, employees, plan administrators, and employers to obtain declaratory judgments in the Tax Court with respect to qualifications of pension plans. The statute also permits intervention by the Secretary of Labor. See H.R. Conf. Rep. No. 93-1280, 93d Cong., 2d Sess. 331-332 (1974).

pitals that do not provide a full range of medical services for the indigent, and the future tax liabilities of the contributors to such hospitals, together with an injunction in support of the declaration, the relief they seek is barred by the express terms of the tax exception to the Declaratory Judgment Act, regardless of the application of the Anti-Injunction Act.

In *Bob Jones University* v. *Simon*, *supra*, 416 U.S. at 732-733, n. 7, this Court did not resolve the question whether the tax exception of the Declaratory Judgment Act has a broader reach than the Anti-Injunction Act. The court of appeals therefore felt free to follow its previous decision in *"Americans United" Inc.* v. *Walters*, 477 F.2d 1169 C.A. D.C.), reversed on other grounds *sub nom. Alexander* v. *"Americans United," Inc.*, 416 U.S. 752, and refused to give the Declaratory Judgment Act any significance independent of the Anti-Injunction Act, reasoning that the two statutes "were intended to be coterminous" (Pet. App. B 42A-43A). We submit that the conclusion of the court of appeals fails to give meaning to the words of the Declaratory Judgment Act and its legislative history and departs from or misreads the applicable precedents.

The tax exemption to the Declaratory Judgment Act was placed in the statute about one year after its original enactment.[37] It was inserted in response to a flood of suits declaring the "processing" taxes

[37] The amendment was contained in Section 405 of the Revenue Act of 1935, 49 Stat. 1027.

unconstitutional or inapplicable. See Borchard, *Declaratory Judgments* (1941 ed.) 850-857. The Senate Report on the prohibitory amendment noted that these cases represented a departure from precedents under the Anti-Injunction Act, and that it was necessary to preserve tax "determination[s]," as well as assessments and collections, free of judicial interference apart from the statutory review system (S. Rep. No. 1240, 74th Cong., 1st Sess., Part 1, 11 (1935):

> Your committee has added an amendment making it clear that the Federal Declaratory Judgments Act of June 14, 1934, has *no application to Federal taxes*. The application of the Declaratory Judgments Act to taxes would constitute a *radical departure* from the long-continued policy of Congress (as expressed in Rev. Stat. 3224 and other provisions) with respect to the determination, assessment, and collection of Federal taxes. Your committee believes that *the orderly and prompt determination and collection of Federal taxes should not be interfered with* by a procedure designed to facilitate the settlement of private controversies, and that *existing procedure both in the Board of Tax Appeals and the courts afford ample remedies for the correction of tax errors*. [Emphasis supplied.]

Thus, even assuming, *arguendo*, that the phrase "assessment and collection" in the Anti-Injunction Act does not encompass petitioners' attempt to obtain a judicial declaration as to the tax liabilities of various hospitals and their contributors, this case

nevertheless falls within the broader statutory phrase "with respect to Federal taxes" of 28 U.S.C. 2201 and concerns the "determination" of federal taxes, within the meaning of the Senate Committee's use of that term. See Bittker and Kaufman, *Taxes and Civil Rights: "Constitutionalizing" the Internal Revenue Code*, 82 Yale L. J. 51, 58 (1972). Indeed, the leading commentator on the Declaratory Judgment Act has acknowledged that the tax exception was based upon a broad rationale which "denies the possibility of challenging federal taxes of any kind on any ground by declaratory action." Borchard, *supra*, at 855.[38]

The decisions of the lower federal courts have applied the Declaratory Judgment Act prohibition to nontaxpayer suits respecting the federal tax liabilities of other parties in circumstances analogous to those presented here. Thus, for example, in *Liberty Amendment Committee of the U.S.A.* v. *United States* (No. 70-721-HP, C.D. Cal.), affirmed *per curiam* (No. 26,507, C.A. 9), certiorari denied, 409 U.S. 1076, the court held that the Declaratory Judgment Act barred an organization exempt from tax under Section 501(c)(4) from obtaining injunctive relief requiring the Treasury Department to

[38] The tax exception to the Declaratory Judgment Act was enacted at the request of the Department of Justice to exclude from the scope of the Act "all actions involving 'federal taxes.'" Borchard, *supra*, at 850. Assistant Attorney General Wideman told the Senate Finance Committee "that Congress intended to apply the Act to matters of private law" and that "tax matters were intended to be excluded" (*ibid.*).

issue a ruling recognizing its eligibility for tax deductible contributions under Section 170(c)(2) and tax-exempt status under Section 501(c)(3). See also *Jolles Foundation* v. *Moysey*, 250 F.2d 166 (C.A. 2); *Bob Jones University* v. *Simon*, *supra*, 416 U.S. at 734, n. 8.

In holding (Pet. App. B 42A-43A) that the tax exception to the Declaratory Judgment Act was "coterminous" with the Anti-Injunction Act, the court of appeals relied upon its prior decision in *"Americans United" Inc.* v. *Walters*, 477 F.2d 1169 (C.A. D.C.), reversed on other grounds *sub nom. Alexander* v. *"Americans United," Inc.* 416 U.S. 752, which in turn relied upon a line of cases beginning with *Tomlinson* v. *Smith*, 128 F.2d 808, 811 (C.A. 7), and followed most recently in *McGlotten* v. *Connally*, 338 F. Supp. 448, 452-453 (D. D.C.).[39] But the *Tomlinson* case and most of its progeny actually support a contrary conclusion.

[39] In *McGlotten*, a three-judge district court ordered the Treasury to revoke the tax-exempt status of a fraternal organization with racially discriminatory membership policies. A motion to dismiss on account of mootness is currently pending. See also *Green* v. *Kennedy*, 309 F. Supp. 1127 (D. D.C.), continued *sub nom. Green* v. *Connally*, 330 F. Supp. 1150 (D. D.C.), affirmed *sub nom. Coit* v. *Green*, 404 U.S. 997 (injunction against Secretary of the Treasury requiring it to adhere to its revised policy refusing to recognize the exempt status of racially discriminatory private schools). Because the Secretary of the Treasury had already changed his policy, he did not appeal the injunction order and the appeal was taken by the intervenors on the merits. In *Bob Jones University* v. *Simon*, *supra*, 416 U.S. at 740, n. 11, the Court indicated that its affirmance in *Coit* lacked full precedential weight.

In *Tomlinson*, a nontaxpayer third-party—a trustee of partnership property—sought injunctive and declaratory relief preventing the Commissioner from levying on partnership property to satisfy the tax liability of another taxpayer, *i.e.*, the plaintiff in his capacity as an individual partner. The court initially held that the Anti-Injunction and the Declaratory Judgment Acts were "co-extensive" in the sense that they did not prohibit suits by nontaxpayers to enjoin levies on their property to satisfy the tax liabilities of other taxpayers. That holding is now codified in Section 7426 of the Internal Revenue Code.[40]

[40] Petitioners argue (Br. 56) that the enactment of Section 7426 of the Code to permit suits by nontaxpayers against the imposition of tax liens on their property and the concomitant modification of the Anti-Injunction Act to take account of this exception demonstrates that the two statutes are coterminous. They suggest that if the Declaratory Judgment Act were broader than the Anti-Injunction Act the additional phrase in the Anti-Injunction Act—"by any person, whether or not such person is the person against whom such tax was assessed"—would not have been necessary.

No such inference can be drawn from the added phrase in Section 7421 and by the amendment to the Anti-Injunction Act. The problem addressed by Section 7326—nontaxpayer suits to enjoin levies on their property to satisfy the tax liabilities of other taxpayers—was generally regarded by the courts as involving property law and not revenue laws. See *Long* v. *Rasmussen*, 281 Fed. 236 (D. Mont.). Thus, such suits were not believed to be within the bar of either the Anti-Injunction Act of Declaratory Judgment Act. It was thought appropriate to place the additional phrase in Section 7421(a) to insure that apart from the narrow Section 7426 exception, Section 7421 would continue to bar injunctive actions by nontaxpayers in the non-revenue property law cases.

Petitioners also contend (Br. 56) that the additional phrase

The court went on to hold, however, that the nontaxpayer plaintiff's attempt to obtain a declaration as to the tax liability of the taxpayer was barred by the tax exception to the Declaratory Judgment Act. The same distinction was made in *Bullock* v. *Latham*, 306 F.2d 45 (C.A. 2), and in *Jules Hairstylists of Maryland* v. *United States*, 268 F. Supp. 511, 515 (D. Md.), affirmed *per curiam*, 389 F.2d 389 (C.A. 4), certiorari denied, 391 U.S. 934, upon which the *McGlotten* opinion (338 F. Supp. at 543, n. 23) relied.[41] Petitioners' attempt to obtain a ju-

in Section 7421 "against whom such tax was assessed," confirms that Section 7421 was never intended to apply to nonassessed parties such as themselves. However, the exception of *Long* v. *Rasmussen, supra*, to Section 7421 turned partially on whether taxes had been assessed against the plaintiff. Thus, the added statutory phrase in Section 7421 used the term "assess" because it was addressed to, and designed to close, the *Long* exception unless Section 7426 applied. The use of that term in treating the *Long* property law situation does not mean that Section 7421 did not previously apply to nonassessed plaintiffs in other situations such as in this case. See, *e.g.*, *Gardner* v. *Helvering*, 88 F.2d 746 (C.A. D.C.). See also *Bob Jones University* v. *Simon, supra*, 416 U.S. at 731-732, n. 6.

[41] Other cases barring suits by nontaxpayers respecting the tax liabilities of other taxpayers on the basis of the Declaratory Judgment Act include: *Singleton* v. *Mathis*, 284 F.2d 616 (C.A. 8) (suit by gambling machine lessor respecting tax liability of lessee); *Mitchell* v. *Riddell*, 402 F.2d 842 (C.A. 9), appeal dismissed and certiorari denied, 394 U.S. 456 (suit by trust grantor respecting exemption from trust income taxes); *West Chester Feed & Supply Co.* v. *Erwin*, 438 F.2d 929 (C.A. 6); and *In re Wingreen Co.*, 412 F.2d 1048 (C.A. 5) (suits by bankruptcy trustee respecting tax liability of the bankrupt).

dicial declaration concerning the tax liabilities of other parties is therefore similarly barred by the "tax exception" to the Declaratory Judgment Act.

D. This Action Constitutes An Unconsented Suit Against The United States And Is Barred By Sovereign Immunity

Petitioners' complaint should have been dismissed for the additional reason that it is an unconsented suit against the United States.

1. This Court has on many occasions reaffirmed the general rule that a suit is against the sovereign if "the judgment sought would expend itself on the public treasury or domain, or interfere with the public administration," *Land* v. *Dollar*, 330 U.S. 731, 738, or if the effect of the judgment would be "to restrain the Government from acting, or to compel it to act," *Larson* v. *Domestic & Foreign Corp.*, 337 U.S. 682, 704; *Dugan* v. *Rank*, 372 U.S. 609, 620. Although the named defendants are the Secretary of the Treasury and the Commissioner of Internal Revenue, "it has long been established that the crucial question is whether the relief sought in a suit nominally addressed to the officer is relief against the sovereign," *Larson* v. *Domestic & Foreign Corp.*, *supra*, 337 U.S. at 687.[42]

[42] Pursuant to those authorities, the court below had previously held in *Reisman* v. *Caplin*, 317 F.2d 123, 125 (C.A. D.C.), affirmed on other grounds, 375 U.S. 440, that sovereign immunity barred an injunctive action by nontaxpayers seeking to enjoin a tax audit that would allegedly injure the plaintiffs.

Here, petitioners seek to compel the Secretary of the Treasury and the Commissioner of Internal Revenue to revoke an outstanding Revenue Ruling, to reinstate a prior Revenue Ruling, to revoke the exempt status of hospitals that do not furnish free care to the indigent, to prohibit the future recognition of such hospitals as tax-exempt organizations, and to collect taxes from such hospitals to the extent they are owing. Petitioners are not suing the named defendants in their individual capacities but are seeking to require them to perform certain actions in their official capacities as administrators of the federal tax laws. Thus, the suit is against the sovereign under the standard of *Hawaii* v. *Gordon*, 373 U.S. 57, because "the order requested would require the * * * [Secretary's] official affirmative action, [and] affect the public administration of government agencies" (*id.* at 58).

Indeed, the nature of the claim of the plaintiff in *Hawaii* v. *Gordon*, was similar to that of petitioners. That case was an original action by the State of Hawaii against the Director of the Bureau of the Budget challenging his interpretation of the Hawaii Statehood Act. The Act provided for the transfer by the United States to Hawaii of lands that the United States no longer needed. The Director held, on the basis of an opinion of the Attorney General, that this provision applied only to lands originally ceded by Hawaii to the United States or lands obtained for exchange of such lands, and not to lands obtained by the United States by purchase,

gift or condemnation, and so advised other federal agencies.

The Court dismissed the suit on the ground that it was an unconsented suit against the United States. Like petitioners who seek an order compelling the Commissioner of Internal Revenue to withdraw his published legal opinion, Hawaii's suit sought an order requiring the Director "to withdraw this advice to the federal agencies, determine whether a certain 203 acres of land in Hawaii acquired by the United States through condemnation was land or properties 'needed by the United States' and, if not needed, to convey this land to Hawaii" (373 U.S. at 58).

2. The court of appeals concluded (Pet. App. B 38A-39A) that sovereign immunity did not bar this action because: (a) petitioners were challenging the authority of the Commissioner of Internal Revenue to interpret a revenue statute in a manner contrary to established congressional policy, and (b) the Administrative Procedure Act constitutes a waiver of sovereign immunity. Both of these grounds are erroneous.

(a) In *Larson* v. *Domestic & Foreign Corp.*, *supra*, 337 U.S. at 689-690, this Court recognized that suits against officers of the sovereign are not suits against the sovereign if the officer allegedly has acted beyond his statutory powers or if the statute under which he acts is alleged to be unconstitutional. In both of those instances, the conduct complained of is not in fact governmental so that the bar of sovereign immunity cannot be invoked.

Neither exception is applicable to this case. Petitioners do not complain that the Secretary or the Commissioner acted unconstitutionally[43] or beyond their statutory powers. In fact, the court of appeals recognized (Pet. App. B 39A), and petitioners have never questioned, the authority of the Commissioner to issue rulings to private organizations regarding their tax-exempt status. Cf. Section 508(a) of the Code. Thus, petitioners' claim is only a contention that the Commissioner has made an erroneous interpretation of the term "charitable" in Section 501 (c)(3) of the Code.

Accordingly, this case falls within the well-established rule that an Executive official's performance of a statutory duty to interpret the law is an action of the sovereign which the courts may not enjoin unless Congress has consented to such a suit. See, *e.g.*, *Hawaii* v. *Gordon*, 373 U.S. 57; *Dugan* v. *Rank*, 372 U.S. 609, 621-622; *Malone* v. *Bowdoin*, 369 U.S. 643; *Larson* v. *Domestic & Foreign Corp.*, *supra*, 337 U.S. at 689-690.

This Court has recognized that Treasury officials are immune from suit challenging their interpretation of the federal tax statutes unless pursuant to specific statutory authorization. As we have pointed out, *supra*, pp. 45-46, *Louisiana* v. *McAdoo*, 234 U.S. 627, held that a suit to declare illegal the Treasury's interpretation of a tax statute must be dismissed even though the particular circumstances would have made

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[43] *Georgia R. Co.* v. *Redwine*, 342 U.S. 299, relied upon by petitioners (Br. 58), involved a claim of unconstitutionality of a state tax and is therefore distinguishable.

it impossible for the plaintiff to obtain judicial review by means of a refund suit or through other procedures. The Court expressed particular concern at the fact that there, as here, the suit was brought by a party whose principal interest was other than his own tax liabilities (234 U.S. at 632):

> Obviously such suits to review the official action of the Secretary of the Treasury in the exercise of his judgment as to the rate which should be exacted under his construction of the * * * [taxing statute] would operate to disturb the whole revenue system of the Government and affect the revenues which arise therefrom. *Such suits would obviously, in effect, be suits against the United States.* [Emphasis supplied.]

Accord: *Jr. C. of C., Rochester, Inc., N.Y.* v. *U.S. Jaycees, Tulsa, Okla.*, 495 F.2d 883, 888-889 (C.A. 10), certiorari denied *sub nom. Junior Chamber of Commerce of Philadelphia* v. *United States Jaycees*, 419 U.S. 1026 (sovereign immunity barred suit by womens' rights group to compel revocation of organization's tax exemption on ground that it excluded women from membership).[44]

[44] There is no record that any Revenue Ruling was ever reviewed by the courts during the nineteenth century. In the earliest days of the Republic, taxpayers were allowed little judicial review of any actions of revenue officials in assessing and collecting taxes. Thus, for example, in 1836, this Court held that a taxpayer might bring an action in the nature of assumpsit against an individual collector for a refund of taxes erroneously collected. *Elliott* v. *Swartwout*, 10 Pet. 137. In 1838, however, Congress enacted legislation providing that all taxes paid to collectors under protest should be remitted promptly to the Treasury without awaiting the result of any

litigation. Act of March 3, 1839, 5 Stat. 348, Section 2. In *Cary* v. *Curtis*, 3 How. 236, 244, this Court noted the government's immunity from suit in holding that the Act of March 3, 1839, had effectively prohibited all assumpsit suits for refund against collectors. The only remaining procedure by which a taxpayer could obtain judicial review of an alleged over-assessment at that time was to post a bond for payment and then litigate liability for the taxes when the government brought suit on the bond. See *Cary* v. *Curtis, supra*, 3 How. at 243; *Ex parte Davenport*, 6 Pet. 661; *United States* v. *Phelps*, 8 Pet. 700. These suits were the predecessor of the modern collection suit, in which liability for the tax may be challenged by the taxpayer. See, *e.g., United States* v. *Rexach*, 482 F.2d 10 (C.A. 1), certiorari denied, 414 U.S. 1039.

Even after Congress provided by statute for refund suits against the collectors (*e.g.*, Act of February 26, 1845, 5 Stat. 727), the courts were extremely strict in requiring exact compliance with the statutory requirements for bringing these suits, and in barring non-complying litigants on sovereign immunity grounds. Thus, in *Nichols* v. *United States*, 7 Wall. 122, 126, the Court held that a taxpayer who had failed to make the required formal protest to the Treasury was barred by sovereign immunity from seeking a tax refund in a Court of Claims action. Cf. *Kings County Savings Institution* v. *Blair*, 116 U.S. 200, 205-206; *Smietanka* v. *Indiana Steel Co.*, 257 U.S. 1; *Lowe Bros. Co.* v. *United States*, 304 U.S. 302, 306; *United States* v. *Garbutt Oil Co.*, 302 U.S. 528, 533-535.

It was not until the Act of July 30, 1954, 68 Stat. 589, that taxpayers were unconditionally allowed to bring suits against the United States for refund in the district courts without limitation as to amount involved and with full right to jury trial. See H.R. Rep. No. 659, 83d Cong., 1st Sess. (1953); H.R. Conf. Rep. No. 2276, 83d Cong., 2d Sess. (1954). See also Plumb, *Tax Refund Suits Against Collectors of Internal Revenue*, 60 Harv. L. Rev. 685 (1947). In addition, Congress has given its consent to taxpayers' suits in the Tax Court for adjudications respecting asserted deficiencies in proposed tax assessments. Section 274 of the Revenue Act of 1924, 43 Stat. 297; see, currently, Sections 6212 and 6213 of the 1954 Code. Apart from these procedures, and with the exception of Section 7426 which is not relevant here, Congress

(b) The second reason of the court of appeals—that the viability of the sovereign immunity doctrine is open to question after the enactment of the Administrative Procedure Act in 1946 (Pet. App. B 37A-38A)—is equally erroneous. The Administrative Procedure Act does not waive the United States' sovereign immunity. Six courts of appeals have so held. *Littell* v. *Morton*, 445 F.2d 1207, 1212 (C.A. 4); *State of Washington* v. *Udall*, 417 F.2d 1310, 1320 (C.A. 9); *Zimmerman* v. *United States Government*, 422 F.2d 326, 330-332 (C.A. 3); *Motah* v. *United States*, 402 F.2d 1, 2 (C.A. 10); *Twin Cities Chippewa Tribal Council* v. *Minnesota Chippewa Tribe*, 370 F.2d 529, 532 (C.A. 8); and *Cyrus* v. *United States*, 226 F.2d 416 (C.A. 1).[45] Three circuits, including the court below, have taken the contrary view. *Scanwell Laboratories, Inc.* v. *Shaffer*, 424 F.2d 859, 873-874 (C.A. D.C.); *Estrada* v. *Ahrens*, 296 F.2d 690 (C.A. 5); and *Kletschka* v. *Driver*, 411 F.2d 436, 445 (C.A. 2) (alternative ground for decision).[46] Compare, however, *Warner* v. *Cox*, 487 F.2d 1301 (C.A. 5); *Colson* v. *Hickel*, 428 F.2d 1046 (C.A. 5); and *Ortego* v. *Weinberger*, C.A. 5, No. 74-3048, decided August 11, 1975, slip op. 6803-6808.

has not consented to suit of the Treasury by either taxpayers or nontaxpayers with respect to the assessment or collection of taxes.

[45] In *Littell* and *State of Washington*, however, the courts held sovereign immunity inapplicable because they concluded that the interests served by judicial review in the particular cases outweighed the interests served by sovereign immunity, even though both actions sought to affect a disposition of sovereign property. See 445 F.2d at 1213-1214; 417 F.2d at 1320. *Littell* involved a claim for legal fees for services rendered. *State of Washington* involved a claim that certain water should be made available to the State without legal restrictions by the federal government. However, if the suit is against the sovereign, only Congress can waive immunity, and the courts cannot decide to entertain such suits based upon their evaluation of the relative interests to be served by judicial review in the particular case. At all events, the present action, involving a challenge to the Secretary of the Treasury's exclusive authority to administer the revenue laws, involves wholly different considerations.

The cases holding that the Administrative Procedure Act waived sovereign immunity rely upon Section 10(a) of that Act, now 5 U.S.C. 702, which provides: "A person * * * adversely affected or aggrieved by agency action within the meaning of a relevant statute, is entitled to judicial review thereof." This section does not deal with jurisdiction, however, but only with standing. The provision dealing with jurisdiction, Section 10(b), now 5 U.S.C. 703, states that the "form of proceeding for judicial review is * * * any applicable form of legal action * * * *in a court of competent jurisdiction*" (emphasis supplied).

The Administrative Procedure Act does not of itself confer jurisdiction, but only prescribes the procedures for administrative review for courts having

[46] But see *Divonne* v. *Internal Revenue Service*, 75-2 U.S.T.C., par. 9619 (S.D. N.Y., July 16, 1975), holding that the judicial review provisions of the Administrative Procedure Act did not waive sovereign immunity in a suit by a tax informer to obtain a reward, since the allowance of such reward was "committed to agency discretion by law" under 5 U.S.C. 701(a)(1), citing the *Kletchka* decision.

jurisdiction. Since sovereign immunity is a jurisdictional issue, the Administrative Procedure Act did not waive it. As this Court said of that Act in *Blackmar* v. *Guerre*, 342 U.S. 512, 515-516, "[s]till less is the Act to be deemed an implied waiver of all governmental immunity from suit."

Thus, viewed from an historical perspective, the purpose and effect of both the sovereign immunity principle and the Anti-Injunction and Declaratory Judgment Acts are to prevent the type of disturbance of the revenue system to which the Court referred in *Louisiana* v. *McAdoo*, *supra*. Taken together, sovereign immunity and the statutory proscriptions serve to restrict judicial review of revenue administration to the statutory system composed of refund and Tax Court and deficiency proceedings. The decision of the court of appeals would extend judicial review to many revenue administrative acts of a wholly different character. If there is to be such an extension of judicial review in the vital area of the administration of the nation's revenue laws, it should be done by Congress, not by the courts.[47]

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[47] Although petitioners dismiss as "utter nonsense" (Br. 62) the possibility that equity suits by nontaxpayers against the Treasury would burden the courts, the number of such suits which have been brought in recent years is in fact quite substantial. See, *e.g.*, *United States* v. *American Friends Service Committee*, 419 U.S. 7 (Anti-Injunction Act barred suit by Quaker organization to enjoin enforcement of withholding tax on its employees); *Cattle Feeders Tax Committee* v. *Shultz*, 504 F.2d 462 (C.A. 10) (Anti-Injunction Act barred suit by nontaxpayer organization to enjoin enforcement of Revenue Ruling relating to deductibility of prepaid cattle feed); *Jr. C. of C., Rochester, Inc., N.Y.* v. *U.S. Jaycees,*

Tulsa, Okla., 495 F.2d 883 (C.A. 10), certiorari denied *sub nom. Junior Chamber of Commerce of Philadelphia* v. *United States*, 419 U.S. 1026 (suit to compel revocation of organization's tax exemption on ground that it excluded women from membership barred by sovereign immunity). See, also, *McCoy* v. *Shultz*, 73-1 U.S.T.C., par. 9233 (D. D.C., February 13, 1973); *Marker* v. *Connally*, 337 F. Supp. 1301 (D. D.C.), affirmed *sub nom. Marker* v. *Shultz*, 485 F.2d 1003 (C.A. D.C.) (ruling for government on merits of suit by dissenting union members to compel Treasury to revoke exempt status of labor union engaged in certain political activities).

Other cases are as follows: *Greenhouse* v. *Most Reverend Charles Pascal Greco* (C.A. 5—No. 75-2050) (appeal from denial of class action and dismissal of suit by black plaintiffs to require revocation of tax exemptions of certain parochial schools because of alleged racial discrimination); *American Society of Travel Agents* v. *Simon* (D. D.C.—Civ. No. 74-1081) (dismissal of suit to compel revocation of exempt status and/or to impose unrelated business tax upon organizations alleged to be substantially involved in travel programs); *Tax Analysts and Advocates* v. *Simon* (D. D.C.—Civ. No. 74-1898) (dismissal for mootness of suit challenging the validity of gift tax ruling affecting political contributions); *Tax Analysts and Advocates, et al.* v. *Simon* (C.A. D.C.—Civ. No. 75-1304) (appeal from dismissal for lack of standing of action seeking revocation of rulings relating to the foreign tax credit allowed international oil companies); *International Telephone and Telegraph Co.* v. *Commissioner* (D. Del—Civ. No. 74-70) (Anti-Injunction and Declaratory Judgment Acts barred suit by corporation seeking revocation of ruling relating to tax consequences of transaction upon its shareholders); *State of Minnesota* v. *United States* (C.A. 7—No. 74-1973) (appeal from dismissal under Anti-Injunction Act of suit to enjoin assessment of federal telephone excise tax); *Common Cause* v. *Connally* (D. D.C.—Civ. No. 1337-71) (suit which sought to enjoin enforcement of Treasury Regulations relating to depreciation guidelines dismissed as moot by agreement); *Rivera* v. *Weinberger* (W.D. Mich.—No. K-74-236CA3) (motion to dismiss denied in suit by migrant farm workers to require the Internal Revenue Service to audit farmers to assist plaintiffs in obtaining Social Security cards).

[Footnote continued on page 80]

If the Court agrees with the foregoing argument that the courts below had no jurisdiction to entertain this action, the judgment of the court of appeals should be reversed and the case should be remanded to the district court with directions to dismiss the complaint for lack of jurisdiction. If, however, the Court disagrees with our submission, it will then have to consider the questions presented in No. 74-1110 relating to the correctness of the Revenue Ruling and the applicability of the notice and hearing requirements of the Administrative Procedure Act to its promulgation—which we now discuss.

II. THE SECRETARY'S REVENUE RULING THAT A HOSPITAL IS ENTITLED TO EXEMPTION FROM TAXES IF IT FURNISHES EMERGENCY CARE FOR ALL PERSONS REGARDLESS OF THEIR ABILITY TO PAY CORRECTLY INTERPRETS THE TERM "CHARITABLE" IN SECTION 501(c)(3) OF THE CODE

1. Section 501(c)(3) of the Internal Revenue Code of 1954, exempts from taxation—

[47] [Continued]

Finally, in the following cases, no jurisdictional opinions or judgments have yet been entered: *Jackson* v. *Statler Foundation* (D. D.C.—Civ. No. 74-499) (suit to require revocation of tax exemption because of taxpayer's alleged racial discrimination); *Alexander* v. *N.F.O.* (W.D. Mo.—Civ. No. 1919-1) (suit to require revocation of tax exemption of competitors because of latter's alleged violations of antitrust laws); *Lugo* v. *Simon* (N.D. Ohio—No. C74-345) (suit by indigent plaintiffs to obtain revocation of Rev. Rul. 69-545 at issue in this case).

> Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to the benefit of any private shareholder or individual * * *.

This provision has its roots in Section 32 of the Act of August 27, 1894, 28 Stat. 556, which exempted "corporations, companies, or associations organized and conducted solely for charitable, religious, or educational purposes * * *." A similar exemption was included in the corporate income tax enacted in 1909. See Act of August 5, 1909, 36 Stat. 113, Section 38. At no time, however, did Congress attempt to define "charitable." The scope of the statutory term "charitable" was left for the Secretary of the Treasury to define in his administration of the tax laws.

To the extent that Congress considered the definition of "charitable," it was extremely broad. As the sponsor of the 1909 exemption provision stated, the exemption extended to those organizations "devoted exclusively to the relief of suffering, to the alleviation of our people, and to all things which commend themselves to every charitable and just impulse" (44 Cong. Rec. 4150 (1909)).

Pursuant to his authority under Section 7805(a) of the Code to "prescribe all needful rules and regulations," the Commissioner of Internal Revenue, on February 26, 1959, issued proposed new Regulations under Section 501(c)(3) of the Code. After consideration of presentations by interested persons at hear-

ings, the Commissioner promulgated the Regulations in final form on June 22, 1959.[48] In pertinent part, Section 1.501(c)(3)-1(d)(2) of the Regulations defined the statutory term "charitable" as follows:

> (2) *Charitable defined.* The term "charitable" is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501(c)(3) of other tax-exempt purposes which may fall within the broad outlines of "charity" as developed by judicial decisions. Such term includes: Relief of the poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency. The fact that an organization which is organized and operated for the relief of indigent persons may receive voluntary contributions from the persons intended to be relieved will not necessarily prevent such organizations from being exempt as an organization organized

[48] See T.D. 6391, 1959-2 Cum. Bull. 139-146; 24 Fed. Reg. 5217, 5219. The proposed regulations and the final Regulations were identical with respect to the definition of "charitable." See 24 Fed. Reg. 1421, 1423.

> and operated exclusively for charitable purposes.

Prior to the 1959 amendment, the Regulations did not contain a comprehensive definition of the term "charitable." Rather, the previously outstanding regulation (Treasury Regulations 118, Section 39.101(6)-1(b)) under the 1939 Code stated:

> Corporations organized and operated exclusively for charitable purposes comprise, in general, organizations for the relief of the poor. The fact that a corporation established for the relief of indigent persons may receive voluntary contributions from the persons intended to be relieved will not necessarily deprive it of exemption.

Petitioners do not challenge the definition of "charitable" in the currently outstanding Section 1.501(c)(3)-1(d)(2) of the Regulations. Indeed, such challenge would be unlikely to succeed, given the long-standing decisions of this Court that Treasury Regulations are "contemporaneous constructions by those charged with administration" of the Code which "must be sustained unless unreasonable and plainly inconsistent with the revenue statutes" and "should not be overruled except for weighty reasons." *Commissioner* v. *South Texas Co.*, 333 U.S. 496, 501. See also *Fawcus Machine Co.* v. *United States*, 282 U.S. 375; *Bingler* v. *Johnson*, 394 U.S. 741, 749-750. Nor do petitioners question the Commissioner's authority to modify the Regulations. Any such argument would likewise fail in light of the settled rule that even Treasury Regulations approved by Con-

gress may be changed by the Secretary pursuant to his broad power under Section 7805(a) of the Code. See, *e.g.*, *Helvering* v. *Reynolds*, 313 U.S. 428, 432; *Helvering* v. *Wilshire Oil Co.*, 308 U.S. 90, 101; *Morrissey* v. *Commissioner*, 296 U.S. 344.

Petitioners argue (Br. 40) that the Commissioner's current ruling governing the tax-exempt status of private hospitals is contrary to the "judicial, administrative, and legislative history of the application of 'charitable' under sections 501(c)(3) and 170(c) * * *" and has thereby "amend[ed] the Code" (Br. 39). Specifically, petitioners' complaint concerns the modification of Rev. Rul. 56-185, in which the Commissioner concluded that in order to qualify as a "charitable" organization, a hospital had to "be operated to the extent of its financial ability for those not able * * * and expected to pay." Subsequently, in Rev. Rul. 69-545, the Commissioner modified his ruling announced in 1956, and held that a hospital would be recognized as tax exempt if, *inter alia*, it promoted the health of a class of persons broad enough to benefit the community as a whole by maintaining an emergency room open to all persons regardless of ability to pay and by providing hospital care to all persons able to pay either themselves or through private insurance or public assistance.

It is settled that the Commissioner is empowered to alter his legal position set forth in published Revenue Rulings. See, *e.g.*, *Dixon* v. *United States*, 381 U.S. 68; *Automobile Club of Michigan* v. *Commissioner*, 353 U.S. 180, 184 (see n. 7, *supra*). Thus,

the change in the Commissioner's rulings position was well within his statutory authority. But quite apart from the Commissioner's authority to change his ruling policy, the court of appeals correctly concluded that the modification in the Commissioner's ruling policy governing the exempt status of hospitals is consistent with the broad definition of "charitable" originally considered by Congress and the more expansive definition of the term adopted in the 1959 Regulations.

Although petitioners argue (Br. 17) that the 1959 amendment to the Regulations did not broaden the concept of "charitable," a simple comparison of the narrow specification of "relief of the poor" under the prior Regulations with the current provision that "[t]he term 'charitable' is used * * * in its generally accepted legal sense" refutes their assertion. Indeed, the Regulations' reference to the "generally accepted legal sense" of the term "charitable" is not without significance. As the court of appeals observed (Pet. App. B 48A), the Commissioner, in publishing Rev. Rul. 69-545, properly relied on the laws of charitable trusts where it has been long established that the term "charitable" means far more than benevolence to the poor. See *Green* v. *Connally*, 330 F. Supp. 1150, 1157 (D. D.C.), affirmed *per curiam sub nom. Coit* v. *Green*, 404 U.S. 997.[49]

The evolution of the "charitable" concept in the

[49] See also Zollman, *American Law of Charity* (1924 ed.), pp. 135-136: "Although the relief of the poor, or a benefit to them is, in its popular sense, a necessary ingredient of charity, this is not so in the view of the law."

law of trusts and the Regulation's reference to the meaning of "charitable" in its accepted legal sense demonstrates the correctness of Rev. Rul. 69-545. While certain early charitable trust cases required charitable hospitals to accept all patients regardless of ability to pay,[50] most recent trust cases involving hospitals allow them to qualify for charitable status on the basis of a more varied or broader range of community benefit activities.[51]

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[50] *E.g.*, *Hart* v. *Taylor*, 301 Ill. 344, 133 N.E. 857, 858; *O'Brien* v. *Physicians' Hospital*, 96 Ohio St. 1, 116 N.E. 975, 977.

[51] See, *e.g.*, *City of Richmond* v. *Hospital*, 202 Va. 86, 116 S.E.2d 79; *Methodist Homes, Inc.* v. *Tax Commissioner*, 226 Ore. 298, 360 P.2d 293; *People ex rel. Doctors Hospital* v. *Sexton*, 48 N.Y.S.2d 201, 267 App. Div. 736, affirmed, 295 N.Y. 553, 64 N.E.2d 273; *Evangelical Lutheran Good Samaritan Soc.* v. *County of Gage*, 181 Neb. 831, 151 N.W.2d 446; *Weiss* v. *Swedish Hospital*, 16 Wash.2d 446, 133 P.2d 978; *In re Henderson's Estate*, 17 Cal.2d 853, 112 P.2d 605; *Benton County* v. *Allen*, 170 Ore. 481, 133 P.2d 991; *In re Claim of Assembly Homes* v. *Yellow Medicine Co.*, 273 Minn. 197, 140 N.W.2d 336; *Brattleboro Retreat* v. *Town of Brattleboro*, 106 Vt. 228, 173 Atl. 209; *Southern Methodist Hospital and Sanitorium of Tucson* v. *Wilson*, 51 Ariz. 424, 77 P.2d 458.

The charitable trust cases relied upon by petitioners (Br. 29-30) lend no support to the free hospital care policy they espouse. Only two of the cases decided later than 1922 involve hospitals rather than homes for the aged. The two remaining cases are distinguishable. *Cleveland Osteopathic Hospital* v. *Zangerle*, 153 Ohio 222, 91 N.E.2d 261 (Br. 29), turned on inordinate private profit rather than hospital admissions. In *Jackson County* v. *State Tax Commission*, 521 S.W.2d 378 (Mo.), the court upheld the state tax exemption of a hospital which had no program for furnishing free non-emergency medical care to indigents but maintained an emergency room open to all regardless of ability to pay—just as Hospital *A* in Rev. Rul. 69-545.

This expansion in the concept of "charitable" reflects the fact that the law of charitable trusts has always included a category for purposes beneficial to the community (see, *e.g.*, *Evans* v. *Newton*, 382 U.S. 296, 307-308 (White, J., concurring)), which has traditionally expanded in order to meet the needs of a changing society. *Todd* v. *Citizens' Gas Co. of Indianapolis*, 46 F.2d 855, 865 (C.A. 7), certiorari denied, 283 U.S. 852; *Bozeman Deaconess Foundation* v. *Gallatin Co.*, 151 Mont. 143, 439 P.2d 915; Bogert, *Trusts* (2d ed. 1964), Section 369. Thus, the court of appeals correctly noted (Pet. App. B 48A and nn. 16, 17) that the law of charitable trusts recognizes that in certain circumstances the promotion of health is a charitable purpose, separate and apart from any requirement of free service to the poor. IV Scott on *Trusts* (3d ed. 1967), Section 372; ALI, Restatement of *Trusts* (2d), Secs. 368, 372.[52]

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[52] Petitioners acknowledge (Br. 30) that Professor Scott's view of charity is much broader than the view they advance. They seek, however, to minimize the force of his authority by noting that his treatise had adopted the broader view of charity as early as 1939, but that Treasury did not allow his view in the case of hospitals until 1969. But even assuming, *arguendo*, that the Treasury's original position with respect to tax-exempt hospitals was contrary to that of Professor Scott, that would hardly foreclose the modifications adopted in 1969. See, *e.g.*, *Morrissey* v. *Commissioner*, *supra*, 296 U.S. at 356-357; *Helvering* v. *Wilshire Oil Co.*, *supra*, 308 U.S. at 100-102; *Helvering* v. *Reynolds*, *supra*, 313 U.S. at 431; *Commissioner* v. *P. G. Lake, Inc.*, 356 U.S. 260, 265-266, n. 5.

Given the Regulations' reliance upon the generally accepted legal sense of the term "charity," petitioners' reliance (Br. 18-20) upon the Commissioner's requirement that tax-exempt

The evolution of tax law has proceeded along similar lines. While service to the poor was given more emphasis in the Treasury's initial administration of the charitable standard,[53] several early decisions upheld tax-exempt status on a broader concept of the term "charitable." See, *e.g.*, *Girard Trust Co.* v. *Commissioner*, 122 F.2d 108 (C.A. 3) (temperance society); *Pennsylvania Co. for Insurance on Lives, Etc.* v. *Helvering*, 66 F.2d 284 (C.A. D.C.) (antivivisection society). However, the 1959 promulgation of Section 1.501(c)(3)-1(d)(2) of the Regulations, with its reference to the general legal meaning of the term "charitable," was a formal recognition by the Treasury that free care for indigents would no longer be given exclusive emphasis.[54]

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public interest law firms or consulting services are not permitted to charge for their services is not relevant. Unlike the promotion of health care, which is recognized as an accepted charitable activity, the furnishing of legal or consulting services is not so recognized.

[53] For example, see I.T. 1800, II-2 Cum. Bull. 152 (1923); cf. Sol. Mem. 2160, III-2 Cum. Bull. 151 (1924). But cf. Sol. Op. 159, III-1 Cum. Bull. 480 (1924), which held that a bequest for the construction of a community auditorium was "charitable," thereby recognizing that the term "charitable" included more than relief of the poor.

[54] Petitioners also argue (Br. 48-49) that Rev. Rul. 69-545 should be invalidated because it was issued by the Treasury "with blinders on and totally excluded all reference to the continued needs of poor people * * *." But, as the court of appeals observed (Pet. App. B 56A), the ruling on its face indicates that the interests of the poor were considered by establishing

As the court of appeals correctly recognized (Pet. App. B 52A), the Commissioner did not abolish in Rev. Rul. 69-545 the general requirement that a hospital furnish some type of free care to the indigent. Rather, he simply provided an additional means (free emergency room treatment) by which a hospital could qualify for tax-exempt status within the "generally accepted legal sense" of the statutory term "charitable," which, as we have pointed out, encompasses much more than relief of the indigent. See Treasury Regulations on Income Tax, Section 1.501(c)(3)-1(d)(2). In no sense, therefore, can a general hospital under the current ruling policy systematically exclude those who cannot pay from all treatment and retain its tax-exempt status.

There is accordingly no basis to petitioners' argument that Rev. Rul. 69-545 is contrary to the legislative or administrative history of the "charitable" standard of Section 501(c)(3) of the Code. As we have pointed out, the intent of Congress was to encompass a broad range of humanitarian activities

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the requirement of emergency treatment for all regardless of ability to pay.

There is similarly no merit to petitioners' contention (Br. 53-55) that the Treasury's consideration of the needs of the poor should have been documented on the public record, rather than explained during this litigation. Revenue Rulings are legal opinions issued by the Treasury, not findings of facts or formal investigatory reports. Thus, *Citizens to Preserve Overton Park* v. *Volpe*, 401 U.S. 402, involving several statutes which specifically required that agency officials either make formal findings, or produce evidence, that certain factual conditions existed, is not apposite to this case.

under the rubric "charitable" and to leave the detailed administration of the statute to the Secretary.[55] Thus, the broadening of the "charitable" standard in the 1959 Regulations to include within its compass activities which are "charitable" in the "generally accepted legal sense" of that term is consistent with the congressional design.

Moreover, the 1959 Regulations presaged the eventual modification of the Commissioner's original rulings policy toward hospitals set forth in Rev. Rul. 56-185, which was tied to the "relief of the poor" standard of the old Regulations. Indeed, given the expansive scope of the current regulatory definition of "charitable," it is doubtful that the Treasury could successfully enforce the policy advocated by petitioners

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[55] For this reason, in the past decade the Internal Revenue Service has recognized the charitable status of numerous non-hospital groups which are not involved in the relief of poverty, such as environmental protection organizations (Rev. Rul. 72-560, 1972-2 Cum. Bull. 248), and women's rights organizations (Rev. Rul. 72-228, 1972-1 Cum. Bull. 148).

Additional examples of charitable organizations which are not specifically devoted to the relief of poverty, some of which even charge fees, include day care centers (Rev. Rul. 68-166, 1968-1 Cum. Bull. 255); organizations devoted to encouraging public interest in the dramatic arts (Rev. Rul. 64-175, 1964-1 (Part 1) Cum. Bull. 185); and a nonprofit organization formed and operated to conduct annual public fairs and exhibitions of livestock, poultry and farm products (Rev. Rul. 67-216, 1967-2 Cum. Bull. 180). The classification of varied activities as "charitable" refutes petitioners' contention (Br. 16) that a tax-exempt organization must lessen the burdens of government.

of requiring tax-exempt hospitals to furnish a broad range of free medical care to indigents.[56]

Contrary to petitioners' argument (Br. 20-24), the courts of appeals have not imposed the furnishing of free care to indigents as a requirement for the tax-exempt status of hospitals. Apart from the fact that many of the cases upon which petitioners rely were decided under the now-supplanted "relief of the poor" standard of the 1939 Regulations, there is no case, under either the old or new Regulations which hold that a hospital was not tax exempt solely because it did not provide free care to the indigent.

In deciding those cases, the courts have considered a number of factors, including but not limited to,

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[56] Petitioners argue (Br. 25-28) that the failure of Congress in 1969 to enact a bill passed by the House which would have generally exempted hospitals regardless of the amount of free care they furnished to the indigent demonstrates that Congress disapproved of the policy announced in Rev. Rul. 69-545. But this Court has often admonished that the advocacy of legislation and the failure of Congress to act is a hazardous basis for statutory interpretation. See, *e.g.*, *American Trucking Co.* v. *A., T. & S.F.R. Co.*, 387 U.S. 397, 417-418; *Red Lion Broadcasting Co.* v. *Federal Communications Commission*, 395 U.S. 367, 381-382, n. 11; *Fogarty* v. *United States*, 340 U.S. 8, 13-14; *United States* v. *United Mine Workers*, 330 U.S. 258, 281-282; *Order of Ry. Conductors* v. *Swan*, 329 U.S. 520, 529. The example of Hospital *B* in Rev. Rul. 69-545 may indicate why such legislation may have been considered ill-advised. At all events, the failure of Congress to exempt hospitals generally can hardly constitute rejection of Rev. Rul. 69-545, which more strictly premises exemption upon an emergency room open to all persons, care of Medicare and Medicaid patients, a publicly controlled governing body, and the absence of private benefit (see Pet. App. B 51A-52A and n. 24).

the amount of free care provided by a hospital. Thus, for example, in *Commissioner* v. *Battle Creek, Inc.*, 126 F.2d 405 (C.A. 5), which petitioners cite (Br. 21) as holding that free care is the "basic test for defining a 'charitable' hospital," the decision turned equally on the fact that the hospital was not chartered in terms that ensured that its assets would be dedicated to charitable purposes in the event of its dissolution. Similarly, while the Sixth Circuit in *Harding Hospitals, Inc.* v. *United States*, 505 F.2d 1068, referred to the hospital's negligible indigent care program as one factor evidencing that it was operated so that its earnings inured to the benefit of its private owners, it specifically refused to adopt petitioner's absolute free care standard. As the court there stated: "We do not single out any one or combination of these factors as the consideration crucial to our holding. We conclude only that all these factors, as they occurred in the aggregate in this case, require denying the appellant Hospital the tax exemption for the years in question" (505 F.2d at 1077). Accord: *Sonora Community Hospital* v. *Commissioner*, 46 T.C. 519, 526, affirmed *per curiam*, 397 F.2d 814 (C.A. 9); *Lorain Avenue Clinic* v. *Commissioner*, 31 T.C. 141, 160.

2. There are sound reasons underlying the Commissioner's modification of his rulings policy toward hospitals. As the court of appeals observed, whatever the merits of the prior ruling which required that a tax-exempt hospital furnish free care to indigents to the extent of its financial ability, "there

is no authority for the conclusion that the determination of 'charitable' status was always to be so limited. Such an inflexible construction fails to recognize the changing economic, social and technological precepts and values of contemporary society" (Pet. App. B 49A).

Unlike the situation early in our nation's history when the hospital as an institution was an almshouse for the poor supported by private philanthropy, the hospital today is the primary community health facility for rich and poor alike. Since 1956, when the Commissioner issued his first revenue ruling concerning the tax-exempt status of hospitals, there have been two dramatic changes in the finances of health care delivery.

First, hospital costs have risen to what this Court has described as "astronomical" proportions, placing private hospitals in "precarious financial straits" *Memorial Hospital* v. *Maricopa County*, 415 U.S. 250, 264-265. Second, the development of both private and public health insurance (*i.e.*, Medicare and Medicaid) has largely displaced self-paying patients and private philanthropy as the principal source of hospital revenue. "The pressure to provide free care has lessened to the extent that these multi-billion dollar programs and private hospital insurance are now paying for many of those whose bills previously went unpaid," *Medicare and Medicaid: Problems, Issues and Alternatives*, Report of the Staff to the Senate Committee on Finance, 91st Cong., 1st Sess. 56 (1970)) (A. 42).

Many of the insurance plans, notably Medicare, Medicaid and Blue Cross, provide reimbursement only on the basis of cost, and thereby generate no surplus for either free care or improvement of facilities. However, at the same time that the amount of excess funds is decreasing, rapid technological change and inflation have demanded an ever accelerating investment by private hospitals for renovation and modernization of facilities.

The institution of Medicare and Medicaid since the promulgation of the first Revenue Ruling has resulted in the admission and treatment by private hospitals of large numbers of insured persons of whom a substantial percentage, in the absence of such governmental reimbursement, would be unable to pay the cost. Thus, a private hospital which meets the criteria of the current Rev. Rul. 69-545, and admits any patient with some form of health insurance, is accepting many of those persons who would have required free or below-cost care in 1956, prior to the advent of Medicare and Medicaid. As a result, the free care for indigents required by the prior Revenue Ruling is of lesser significance for the health care of the poor today than it was in 1956.[57]

[57] Petitioners argue (Br. 38-39) that the policy of Rev. Rul. 69-545 is contrary to the regulations adopted by the Department of Health, Education and Welfare with respect to the grants under the Hill-Burton Act for hospital construction. Under those regulations, the Department specifically defines the amount of free care to the indigent a recipient hospital must provide. However, the Hill-Burton Act is simply one program under which the government purchases health care for the poor in advance of the performance of the services. Indeed, the recipient hospitals' obligation to provide a reasonable amount of free care has been held to be a contractual obligation arising out of the receipt of federal funds. See *Euresti* v. *Stenner*, 458 F.2d 1115 (C.A. 10). Given the relatively small proportion of Hill-Burton funds compared to Medicare and Medicaid payments (see Br. Amicus American Hospital Association 67, n. 111), a federal policy of free health care to indigents cannot be demonstrated from the Hill-Burton program.

Moreover, the emergency room requirements of the current Rev. Rul. 69-545 fulfill a significant part of the hospital care needs of the poor. For it is true, if unfortunate, that the emergency room is to most poor persons what the family doctor is to the economically advantaged. "When health needs become critical, families that do not have adequate financial resources may find the emergency rooms and outpatient clinics of general hospitals the only available resource," *National Advisory Commission on Health Facilities: A Report to the President*, p. 20 (1969) (see Pet. App. B 52A, n. 25).

Finally, the indigent care requirement of Rev. Rul. 56-185, which petitioners seek to have restored to universal application, proved to be administratively unworkable in practice. The standard of that ruling for ascertaining a hospital's ability to provide health care to the poor—"to the extent of its financial ability"—is virtually impossible to apply fairly. Even if a hospital has surplus funds available, does it have "financial ability" to furnish free services if many of its facilities need replacement, if it needs new

technological equipment to enable it to implement modern medical procedures, or if it should initiate new training programs?

Modernization of facilities, installation of new equipment, expansion of training programs all are bona fide charitable purposes because they promote health and benefit the public generally. What is the "financial ability" of a hospital to furnish free care when it has net revenue, but when it also has other critical needs competing for such excess dollars as it may have available? Under the financial ability test of Rev. Rul. 56-185, the Internal Revenue Service presumably would have to determine how much a hospital should spend for free care and how much for other critical needs, a task for which it is singularly ill-equipped.[58] However, the standards implicit in Rev. Rul. 69-545 are less likely to involve the

[58] The unworkability of the old Rev. Rul. 56-185 is amply demonstrated by the Brief Amicus Curiae of the American Public Health Association. It argues (p. 33, n. 68) that a hospital's financial ability to provide free care to indigents can only be measured by excluding the amount represented by its uncollected receivables. But surely a hospital's failure to collect its fees injures its financial capacity and reduces its ability to furnish free care to indigent patients.

Moreover, the Association further argues (Br. 39-40) that much of the current hospital construction is not in the public interest and such funds should be allocated for health care for the poor. But this contention must be contrasted with its earlier criticism (Br. 27) of local governments in California for closing county hospitals and thereby increasing the burdens on the private hospitals. Obviously, the complex nature of the current health care crisis demonstrates that it cannot be solved, or even materially eased, by any single federal tax policy such as the prior Rev. Rul. 56-185.

Treasury in formulating guidelines with respect to the details of hospital administration (see Pet. App. B 53A, n. 26).

Of course, no Treasury-mandated charity requirement can by itself solve the nation's severe health care crisis. Revenue Ruling 56-185 did not, and Rev. Rul. 69-545 cannot be expected to bring quality health care to all who need it. But that is not the issue. As the court of appeals correctly concluded with respect to the question presented here, "Revenue Ruling 69-545 is founded on a permissible definition of the term 'charitable' and is not contrary to any express Congressional intent" (Pet. App. B 53A).

III. THE SECRETARY'S PROMULGATION OF THE REVENUE RULING WAS EXEMPT FROM THE NOTICE AND HEARING REQUIREMENTS OF THE ADMINISTRATIVE PROCEDURE ACT BECAUSE THE RULING WAS AN INTERPRETATIVE RULE

Petitioners alternatively argue (Br. 41-47) that even if Rev. Rul. 69-545 correctly interprets the term "charitable" in Section 501(c)(3) of the Code, the Ruling is nevertheless invalid because the Secretary of the Treasury did not promulgate it in accordance with the notice and hearing requirements of the Administrative Procedure Act, 5 U.S.C. 553. Section 553(b) and (c) of the Administrative Procedure Act provides that a "[g]eneral notice of proposed [agency] rule making shall be published in the Federal Register" and that the agency "shall give interested persons an opportunity to participate in the rule making through submission of written data,

views, or arguments * * *." However, Section 553 (b)(3)(A) specifically excepts from the notice and hearing requirements "interpretative rules, general statements of policy, or rules of agency organizations, procedure or practice."

The court of appeals correctly held (Pet. App. B 53A-56A) that Rev. Rul. 69-545 was not subject to the notice and hearing requirements of the Administrative Procedure Act because it came within the Section 553(b)(3)(A) exception for "interpretative rules." As that court observed, it is well settled that agency rulings that do not bind the affected parties or the courts are interpretative rules within the meaning of Section 553(b)(3)(A). See, *e.g.*, *American President Lines, Ltd.* v. *Federal Maritime Commission*, 316 F.2d 419, 422 (C.A. D.C.); *United States* v. *353 Cases, Etc.*, 247 F.2d 473, 480 (C.A. 8); *Gibson Wine Co.* v. *Snyder*, 194 F.2d 329, 331-332 (C.A. D.C.); *Stearns Elec. Paste Co.* v. *Environmental Protection Agency*, 461 F.2d 293, 304 (C.A. 7). Thus, for example, *Gibson Wine Co.* v. *Snyder*, *supra*, held in analogous circumstances that a letter ruling issued by a Deputy Commissioner of Internal Revenue was an interpretative rule not subject to the notice and hearing requirements of the Administrative Procedure Act. In explaining the "interpretative rule" exception, the court stated (194 F.2d at 331-332):

> The distinctive characteristics of interpretative rulings, as contrasted with so-called regulations, have long been recognized. Administrative officials frequently announce their views as to the meaning of statutes or regulations. Generally speaking, it seems to be established that "regulations," "substantive rules" or "legislative rules" are those which create law, usually implementary to an existing law, whereas interpretative rules are statements as to what the administrative officer thinks the statute or regulation means. * * * "A substantive rule is one which, as I have said, is intended to implement the statutory structure or the statutory powers of an agency. An interpretative rule is one which does not have the full force and effect of a substantive rule but which is in the form of an explanation of particular terms in an Act. If you had an expression in a statute such as 'Interurban Railway,' the query might come up as to what is an 'interurban railway.' A particular agency may adopt a rule defining an interurban railway. That, in a sense, may be called an interpretative rule." * * *

Unlike the cases relied upon by petitioners, which involve substantive agency orders with binding legal effect,[59] the published Revenue Ruling at issue here

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[59] See, *e.g.*, *National Labor Relations Board* v. *Wyman-Gordon Co.*, 394 U.S. 759; *Lewis-Mota* v. *Secretary of Labor*, 469 F.2d 478 (C.A. 2); *Texaco, Inc.* v. *Federal Power Commission*, 412 F.2d 740 (C.A. 3). While several of the other cases cited by petitioners note other factors such as complexity, degree of change and confusion stemming from the agency pronouncement to determine whether it is interpretative, the court of appeals correctly noted (Pet. App. B 55A, n. 30) that such "factors have been considered by the courts * * * [but] are not determinative here where a ruling is clearly interpretative in nature and has no legally binding effect."

is only an interpretation by the Treasury of the statutory term "charitable." Such a ruling is informational in character and represents an announcement of position in much the same way as a speech by a Treasury official or an argument presented to a court. It can hardly be contended that such statements are "rule-making" subject to the notice and hearing requirements of the Administrative Procedure Act. Cf. *Helco Products Co.* v. *McNutt*, 137 F.2d 681, 683-684 (C.A. D.C.). As the Court stated in *Dixon* v. *United States*, *supra*, 381 U.S. at 73, "[revenue rulings] are merely guidelines for * * * [Internal Revenue Service] personnel." Thus, this Court and the lower federal courts have consistently held that Revenue Rulings are legal opinions issued by the Commissioner's staff which have no binding force or effect of law and are subject to change or even retroactive revocation. See, *e.g.*, *Helvering* v. *N.Y. Trust Co.*, 292 U.S. 455, 468; *Biddle* v. *Commissioner*, 302 U.S. 573, 582; *Bartels* v. *Birmingham*, 332 U.S. 126, 131-132; *Automobile Club of Michigan* v. *Commissioner*, 353 U.S. 180, 184; *Sims* v. *United States*, 252 F.2d 434, 438 (C.A. 4); *United States* v. *Bennett*, 186 F.2d 407, 410 (C.A. 5); Rev. Rul. 2, 1953-1 Cum. Bull. 484. See also *Skidmore* v. *Swift & Co.*, 323 U.S. 134, 137-138, 140. Indeed, the limited effect of Revenue Rulings [60] is described in each

[60] Unlike Revenue Rulings which are not binding on the courts and are therefore not subject to the notice and hearing requirements of the Administrative Procedure Act, Treasury Regulations are issued pursuant to notice and hearing under

volume of the Cumulative Bulletin in which they are published, as follows (1969-2 Cum. Bull. xxii):

> Revenue Rulings represent the conclusions of the Service on the application of the law to the entire state of facts involved. * * *
>
> Rulings and procedures reported in the Bulletin do not have the force and effect of Treasury Department Regulations, but they may be used as precedents. Unpublished rulings will not be relied on, used, or cited as precedents by Service personnel in the disposition of other cases. In applying published rulings and procedures, the effect of subsequent legislation, regulations, court

that Act. There are two types of Regulations promulgated by the Treasury under its tax administration authority, legislative regulations and interpretative regulations. The former (see n. 15, *supra*) are issued subject to a broad statutory delegation and are considered to have the force and effect of law and are essentially binding on the courts and the affected parties. See, *e.g.*, *A.T. & T. Co.* v. *United States*, 299 U.S. 232, 236-237; *Lucas* v. *American Code Co.*, 280 U.S. 445, 449. See also Alvord, *Treasury Regulations and the Wilshire Oil Case*, 40 Col. L. Rev. 252, 259-260 (1940); Feller, *Addendum to the Regulations Problem*, 54 Harv. L. Rev. 1311, 1320-1321 (1941); Surrey, *The Scope and Effect of Treasury Regulations under the Income, Estate, and Gift Taxes*, 88 U. Pa. L. Rev. 556, 557-558 (1940).

The Administrative Procedure Act does not appear to be applicable to interpretative regulations, which, like Revenue Rulings, set forth the Treasury's construction of various sections of the Internal Revenue Code. However, because it is often difficult to distinguish between legislative and interpretative regulations, the Treasury issues both types of regulations subject to the notice and hearing requirements of the Act. See Rogovin, *The Four R's: Regulations, Rulings, Reliance, and Retroactivity*, *supra*, 43 Taxes at 759, n. 6.

> decisions, rulings, and procedures must be considered, and Service personnel and others concerned are cautioned against reaching the same conclusions in other cases unless the facts and circumstances are substantially the same.

Petitioners argue (Br. 47) that the Section 553 (b)(3)(A) exception for interpretative rules is inapplicable here because the "affected parties, people unable to pay for hospital care, are effectively bound by Revenue Ruling 69-545." But the "affected parties" for purposes of the Administrative Procedure Act are not prospective hospital patients but the hospitals themselves, since it is their tax liability and eligibility for deductible contributions that is the subject of Rev. Rul. 69-545.

If a hospital chose not to maintain an emergency room open to all persons regardless of their ability to pay and litigated the question of its entitlement to tax-exempt status, the conclusion of Rev. Rul. 69-545 that such a hospital was not exempt would not be legally binding on either the hospital or the courts. To the contrary, if the court disagreed with the Treasury's open emergency room requirement, it would be free to reject it, despite its promulgation in a Revenue Ruling.[61] Accordingly, the ruling fits the classic definition of an "interpretative rule" which

[61] Indeed, petitioners do not challenge the court of appeals' statement (Pet. App. B 55A) that they "concede that Revenue Ruling 69-545 has no independent binding effect and that the courts are not bound by it unless they choose to accept it as a proper interpretation of the meaning of the word 'charitable' as used in § 501(c)(3)."

is not subject to the notice and hearing requirements of the Administrative Procedure Act.[62]

CONCLUSION

For the reasons stated, the judgment of the court of appeals should be reversed and the case remanded to the district court with instructions to dismiss the complaint for lack of jurisdiction.[63] Alternatively,

[62] Of course, even if Rev. Rul. 69-545 were subject to the notice and hearing requirements of the Administrative Procedure Act, that conclusion would not justify the restoration of the prior Rev. Rul. 56-185 sought by petitioners. Such a result could only be achieved if the current Rev. Rul. 69-545 were held to be substantively incorrect and the prior Ruling were held to embody the sole correct interpretation of the statutory term "charitable." Thus, the invalidation of the current Rev. Rul. 69-545 for failure to comply with the notice and hearing requirements would not prevent the Treasury from continuing to employ the criteria set forth in that Ruling.

[63] It is well settled that if a complaint is dismissed on the merits in the courts below, but should have been dismissed on jurisdictional grounds, this Court will vacate the judgment and order entry of a judgment dismissing the complaint for lack of jurisdiction. *E.g.*, *Shawnee Sewerage & Dr. Co.* v. *Stearns*, 220 U.S. 462, 471-472; *Smallwood* v. *Gallardo*, 275 U.S. 56; *Piedmont & Nor. Ry.* v. *United States*, 280 U.S. 469, 478; *Gully* v. *Interstate Nat. Gas Co.*, 292 U.S. 16. This is the case even if the appeal to this Court is taken by the party which had generally prevailed in the court of appeals. See *Electrical Corp.* v. *Thomas Co.*, 307 U.S. 241.

the judgment of the court of appeals should be affirmed.

Respectfully submitted.

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SEPTEMBER 1975.

APPENDIX A

Internal Revenue Code of 1954 (26 U.S.C.):

SEC. 170. CHARITABLE, ETC., CONTRIBUTIONS AND GIFTS.

* * * * *

(c) *Charitable Contribution Defined.* — *For* purposes of this section, the term "charitable contribution" means a contribution or gift to or for the use of—

* * * * *

(2) A corporation, trust, or community chest, fund, or foundation—

* * * * *

(B) organized and operated exclusively for religious, charitable, scientific, literary, or educational purposes or for the prevention of cruelty to children or animals;

* * * * *

SEC. 501. EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.

* * * * *

(c) *List of Exempt Organizations.*—The following organizations are referred to in subsection (a):

* * * * *

(3) Corporations, and any community chest, fund, or foundation, organized and operated exclusively for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals, no part of the net earnings of which inures to

the benefit of any private shareholder or individual, no substantial part of the activities of which is carrying on propaganda, or otherwise attempting, to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

* * * * *

SEC. 7421. PROHIBITION OF SUITS TO RESTRAIN ASSESSMENT OR COLLECTION.

(a) *Tax.*—Except as provided in sections 6212(a) and (c), 6213(a), and 7426(a) and (b)(1), no suit for the purpose of restraining the assessment or collection of any tax shall be maintained in any court by any person, whether or not such person is the person against whom such tax was assessed.

* * * * *

SEC. 7801. AUTHORITY OF DEPARTMENT OF THE TREASURY.

(a) *Powers and Duties of Secretary.*—Except as otherwise expressly provided by law, the administration and enforcement of this title shall be performed by or under the supervision of the Secretary of the Treasury.

* * * * *

SEC. 7802. COMMISSIONER OF INTERNAL REVENUE.

There shall be in the Department of the Treasury a Commissioner of Internal Revenue, who shall be appointed by the President, by and with

the advice and consent of the Senate. The Commissioner of Internal Revenue shall have such duties and powers as may be prescribed by the Secretary.

5 U.S.C. 553:

Rule making.

(b) General notice of proposed rule making shall be published in the Federal Register, unless persons subject thereto are named and either personally served or otherwise have actual notice thereof in accordance with law. The notice shall include—

* * * * *

(3) either the terms or substance of the proposed rule or a description of the subjects and issues involved.

(c) After notice required by this section, the agency shall give interested persons an opportunity to participate in the rule making through submission of written data, views, or arguments with or without opportunity for oral presentation. After consideration of the relevant matter presented, the agency shall incorporate in the rules adopted a concise general statement of their basis and purpose. When rules are required by statute to be made on the record after opportunity for an agency hearing, sections 556 and 557 of this title apply instead of this subsection.

* * * * *

28 U.S.C. 2201:

Creation of remedy.

In a case of actual controversy within its jurisdiction, except with respect to Federal taxes,

any court of the United States, upon the filing of an appropriate pleading, may declare the rights and other legal relations of any interested party seeking such declaration, whether or not further relief is or could be sought. Any such declaration shall have the force and effect of a final judgment or decree and shall be reviewable as such.

28 U.S.C. 2202:

Further relief.

Further necessary or proper relief based on a declaratory judgment or decree may be granted, after reasonable notice and hearing, against any adverse party whose rights have been determined by such judgment.

Treasury Regulations on Income Tax (1954 Code) (26 C.F.R.):

§ 1.501(c)(3)-1 *Organizations organized and operated for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals.*

* * * * *

(d) *Exempt purposes.* * * *

(2) *Charitable defined.* The term "charitable" is used in section 501(c)(3) in its generally accepted legal sense and is, therefore, not to be construed as limited by the separate enumeration in section 501 (c)(3) of other tax-exempt purposes which may fall within the broad outlines of "charity" as developed by judicial decisions. Such term includes: Relief of the

poor and distressed or of the underprivileged; advancement of religion; advancement of education or science; erection or maintenance of public buildings, monuments, or works; lessening of the burdens of Government; and promotion of social welfare by organizations designed to accomplish any of the above purposes, or (i) to lessen neighborhood tensions; (ii) to eliminate prejudice and discrimination; (iii) to defend human and civil rights secured by law; or (iv) to combat community deterioration and juvenile delinquency. The fact that an organization which is organized and operated for the relief of indigent persons may receive voluntary contributions from the persons intended to be relieved will not necessarily prevent such organization from being exempt as an organization organized and operated exclusively for charitable purposes. The fact that an organization, in carrying out its primary purpose, advocates social or civic changes or presents opinion on controversial issues with the intention of molding public opinion or creating public sentiment to an acceptance of its views does not preclude such organization from qualifying under section 501(c)(3) so long as it is not an "action" organization of any one of the types described in paragraph (c)(3) of this section.

* * * * *

APPENDIX B

Rev. Rul. 69-545, 1969-2 Cum. Bull. 117

Advice has been requested whether the two non-profit hospitals described below qualify for exemption from Federal income tax under section 501(c)(3) of the Internal Revenue Code of 1954. The articles of organization of both hospitals meet the organizational requirements of section 1.501(c)(3)-1(b) of the Income Tax Regulations, including the limitation of the organizations' purposes to those described in section 501(c)(3) of the Code and the dedication of their assets to such purposes.

Situation 1. Hospital *A* is a 250-bed community hospital. Its board of trustees is composed of prominent citizens in the community. Medical staff privileges in the hospital are available to all qualified physicians in the area, consistent with the size and nature of its facilities. The hospital has 150 doctors on its active staff and 200 doctors on its courtesy staff. It also owns a medical office building on its premises with space for 60 doctors. Any member of its active medical staff has the privilege of leasing available office space. Rents are set at rates comparable to those of other commercial buildings in the area.

The hospital operates a full time emergency room and no one requiring emergency care is denied treatment. The hospital otherwise ordinarily limits admissions to those who can pay the cost of their hospitalization, either themselves, or through private

health insurance, or with the aid of public programs such as Medicare. Patients who cannot meet the financial requirements for admission are ordinarily referred to another hospital in the community that does serve indigent patients.

The hospital usually ends each year with an excess of operating receipts over operating disbursements from its hospital operations. Excess funds are generally applied to expansion and replacement of existing facilities and equipment, amortization of indebtedness, improvement in patient care, and medical training, education, and research.

Situation 2. Hospital *B* is a 60-bed general hospital which was originally owned by five doctors. The owners formed a non-profit organization and sold their interests in the hospital to the organization at fair market value. The board of trustees of the organization consists of the five doctors, their accountant, and their lawyer. The five doctors also comprise the hospital's medical committee and thereby control the selection and the admission of other doctors to the medical staff. During its first five years of operation, only four other doctors have been granted staff privileges at the hospital. The applications of a number of qualified doctors in the community have been rejected.

Hospital admission is restricted to patients of doctors holding staff privileges. Patients of the five original physicians have accounted for a large majority of all hospital admissions over the years. The hospital maintains an emergency room, but on a

relatively inactive basis, and primarily for the convenience of the patients of the staff doctors. The local ambulance services have been instructed by the hospital to take emergency cases to other hospitals in the area. The hospital follows the policy of ordinarily limiting admissions to those who can pay the cost of services rendered. The five doctors comprising the original medical staff have continued to maintain their offices in the hospital since its sale to the nonprofit organization. The rental paid is less than that of comparable office space in the vicinity. No office space is available for any of the other staff members.

Section 501(c)(3) of the Code provides for exemption from Federal income tax of organizations organized and operated exclusively for charitable, scientific, or educational purposes, no part of the net earnings of which inures to the benefit of any private shareholder or individual.

Section 1.501(c)(3)-1(d)(1)(ii) of the regulations provides that an organization is not organized or operated exclusively for any purpose set forth in section 501(c)(3) of the Code unless it serves a public rather than a private interest.

Section 1.501(c)(3)-1(d)(2) of the regulations states that the term "charitable" is used in section 501(c)(3) of the Code in its generally accepted legal sense.

To qualify for exemption from Federal income tax under section 501(c)(3) of the Code, a nonprofit hospital must be organized and operated exclusively

in furtherance of some purpose considered "charitable" in the generally accepted legal sense of that term, and the hospital may not be operated, directly or indirectly, for the benefit of private interests.

In the general law of charity, the promotion of health is considered to be a charitable purpose. *Restatement (Second), Trusts*, sec. 368 and sec. 372; IV *Scott on Trusts* (3rd ed. 1967), sec. 368 and sec. 372. A nonprofit organization whose purpose and activity are providing hospital care is promoting health and may, therefore, qualify as organized and operated in furtherance of a charitable purpose. If it meets the other requirements of section 501(c)(3) of the Code, it will qualify for exemption from Federal income tax under section 501(a).

Since the purpose and activity of Hospital *A*, apart from its related educational and research activities and purposes, are providing hospital care on a nonprofit basis for members of its community, it is organized and operated in furtherance of a purpose considered "charitable" in the generally accepted legal sense of that term. The promotion of health, like the relief of poverty and the advancement of education and religion, is one of the purposes of the general law of charity that is deemed beneficial to the community as a whole even though the class of beneficiaries eligible to receive a direct benefit from its activities does not include all members of the community, such as indigent members of the community, provided that the class is not so small that its relief is not of benefit to the com-

munity. *Restatement (Second), Trusts*, sec. 368, comment (b) and sec. 372, comments (b) and (c); IV *Scott on Trusts* (3rd ed. 1967), sec. 368 and sec. 372.2. By operating an emergency room open to all persons and by providing hospital care for all those persons in the community able to pay the cost thereof either directly or through third party reimbursement, Hospital *A* is promoting the health of a class of persons that is broad enough to benefit the community.

The fact that Hospital *A* operates at an annual surplus of receipts over disbursements does not preclude its exemption. By using its surplus funds to improve the quality of patient care, expand its facilities, and advance its medical training, education, and research programs, the hospital is operating in furtherance of its exempt purposes.

Furthermore, Hospital *A* is operated to serve a public rather than a private interest. Control of the hospital rests with its board of trustees, which is composed of independent civil leaders. The hospital maintains an open medical staff, with privileges available to all qualified physicians. Members of its active medical staff have the privilege of leasing available space in its medical building. (See Rev. Rul. 69-464, page 132, this Bulletin.) It operates an active and generally accessible emergency room. These factors indicate that the use and control of Hospital *A* are for the benefit of the public and that no part of the income of the organization

is inuring to the benefit of any private individual nor is any private interest being served.

Accordingly, it is held that Hospital *A* is exempt from Federal income tax under section 501(c)(3) of the Code.

Hospital *B* is also providing hospital care. However, in order to qualify under section 501(c)(3) of the Code, an organization must be organized and operated *exclusively* for one or more of the purposes set forth in that section. Hospital *B* was initially established as a proprietary institution operated for the benefit of its owners. Although its ownership has been transferred to a nonprofit organization, the hospital has continued to operate for the private benefit of its original owners who exercise control over the hospital through the board of trustees and the medical committee. They have used their control to restrict the number of doctors admitted to the medical staff, to enter into favorable rental agreements with the hospital, and to limit emergency room care and hospital admission substantially to their own patients. These facts indicate that the hospital is operated for the private benefit of its original owners, rather than for the exclusive benefit of the public. See *Sonora Community Hospital* v. *Commissioner*, 46 T.C. 519 (1966), aff'd 397 F.2d 814 (1968).

Accordingly, it is held that Hospital *B* does not qualify for exemption from Federal income tax under section 501(c)(3) of the Code. In considering whether a nonprofit hospital claiming such exemption

is operated to serve a private benefit, the Service will weigh all of the relevant facts and circumstances in each case. The absence of particular factors set forth above or the presence of other factors will not necessarily be determinative.

Even though an organization considers itself within the scope of *Situation* 1 of this Revenue Ruling, it must file an application on Form 1023, Exemption Application, in order to be recognized by the Service as exempt under section 501(c)(3) of the Code. The application should be filed with the District Director of Internal Revenue for the district in which is located the principal place of business or principal office of the organization. See section 1.501(a)-1 of the regulations.

Revenue Ruling 56-185, C.B. 1956-1, 202 sets forth requirements for exemption of hospitals under section 501(c)(3) more restrictive than those contained in this Revenue Ruling with respect to caring for patients without charge or at rates below cost. In addition, the fourth requirement of Revenue Ruling 56-185 is ambiguous in that it can be read as implying that the possibility of "shareholders" or "members" sharing in the assets of a hospital upon its dissolution will not preclude exemption of the hospital as a charity described in section 501(c)(3) of the Code. Section 1.501(c)(3)-1(b)(4) of the regulations promulgated subsequent to Revenue Ruling 56-185 makes it clear, however, that an absolute dedication of assets to charity is a precondition to exemption under section 501(c)(3) of the Code.

Revenue Ruling 56-185 is hereby modified to remove therefrom the requirements relating to caring for patients without charge or at rates below cost. Furthermore, requirement four has been modified by section 1.501(c)(3)-1(b)(4) of the regulations.

Rev. Rul. 56-185, 1956-1 Cum. Bull. 202

> Criteria or tests to be met in determining whether a hospital qualifies for exemption from Federal income tax under section 501(a) of the Internal Revenue Code of 1954 as an organization described in section 501(c)(3) thereof.

Advice has been requested concerning the criteria or tests to be met in determining whether a hospital can qualify for exemption from income tax as a public charitable organization.

Section 501(c) of the Internal Revenue Code of 1954 describes certain organizations exempt from income tax under section 501(a) and reads, in part, as follows:

> (3) Corporations, and any community chest, fund of foundation, organized and operated exclusively for religious, charitable, scientific * * * purposes, * * * and no part of the net earnings of which inures to the benefit of any private shareholder or individual, and no substantial part of the activities of which is carrying on propaganda, or otherwise attempting to influence legislation, and which does not participate in, or intervene in (including the publishing or distributing of statements), any political campaign on behalf of any candidate for public office.

The only ground upon which a hospital may be held to be exempt under section 501(c)(3) of the Code is that it is organized and operated primarily for educational, scientific or public charitable purposes. Usually, the ground for exemption is that it is organized and operated for public charitable purposes. The Supreme Court of the United States in *Helvering* v. *Susan D. Bliss et al.*, 293 U.S. 144, Ct. D. 884, C.B. XIII-2, 191 (1934), held that the provisions of law granting exemption of income devoted to charity are liberalizations of the law in the taxpayer's favor, were begotten from motives of public policy, and are not to be narrowly construed. Thus, in regard to hospitals and similar organizations, the Internal Revenue Service takes the position that the term "charitable" in its legal sense and as it is used in section 501(c)(3) of the Code contemplates an implied public trust constituted for some public benefit, the income or beneficial interest of which may not inure to the benefit of any private shareholder or individual.

In order for a hospital to establish that it is exempt as a public charitable organization within the contemplation of section 501(c)(3), it must, among other things, show that it meets the following general requirements:

1. It must be organized as a nonprofit charitable organization for the purpose of operating a hospital for the care of the sick. A nonprofit hospital chartered only in general terms as a charitable corporation can meet the test as be-

ing organized exclusively for charitable purposes. See *Commissioner* v. *Battle Creek, Inc.*, 126 Fed. (2d) 405.

2. It must be operated to the extent of its financial ability for those not able to pay for the services rendered and not exclusively for those who are able and expected to pay. It is normal for hospitals to charge those able to pay for services rendered in order to meet the operating expenses of the institution, without denying medical care or treatment to others unable to pay. The fact that its charity record is relatively low is not conclusive that a hospital is not operated for charitable purposes to the full extent of its financial ability. It may furnish services at reduced rates which are below cost, and thereby render charity in that manner. It may also set aside earnings which it uses for improvements and additions to hospital facilities. It must not, however, refuse to accept patients in need of hospital care who cannot pay for such services. Furthermore, if it operates with the expectation of full payment from all those to whom it renders services, it does not dispense charity merely because some of its patients fail to pay for the services rendered.

3. It must not restrict the use of its facilities to a particular group of physicians and surgeons, such as a medical partnership or association, to the exclusion of all other qualified doctors. Such limitation on the use of hospital facilities is inconsistent with the public service concept inherent in section 501(c)(3) and the prohibition against the inurement of benefits to private shareholders or individuals. It is recog-

nized, however, that in the operation of a hospital there must of necessity be some discretionary authority in the management to approve the qualifications of those applying for the use of the medical facilities. The size and nature of facilities may also make it necessary to impose limitations on the extent to which they may be made available to all reputable and competent physicians in the area.

4. Its net earnings must not inure directly or indireclty to the benefit of any private shareholder or individual. This includes the use by or benefit to its members of its earnings by way of a distribution of profits, the payment of excessive rents or excessive salaries, or the use of its facilities to serve their private interests. If provision is made in the bylaws for dividends, exemption will not be allowed even though no dividends have been declared. Exemption will not be defeated, however, merely because the shareholders or members might possibly at some future date share in the assets upon dissolution in the absence of a case of mala fides where there appears to be a plan on the part of the shareholder or individual to acquire assets on the dissolution of the corporation.

A community hospital of the type supported partly by contributions from the general public and/or public grants from a city, county or state, normally meets the requirements of section 501(c)(3) as a public charitable organization. It is formed for the purpose of furnishing hospital facilities to all persons in the community at the lowest possible cost and

necessarily accepts patients who are unable to pay for hospital facilities in order to retain the support of the community. A nominal charity record for a given period of time, in the absence of charitable demands of the community, will not affect its right to continued exemption. On the other hand, a hospital formed by one or more physicians in a community who may own the capital stock thereof or rent the hospital facilities to a corporation which they control requires careful study to determine whether it is being operated in part to service their interest, directly or indirectly. See I. T. 2421, C.B. VII-2, 150 (1928).

A hospital formed to operate on a membership basis to provide, at fixed rates, prepaid hospitalization to its members is not a charitable organization within the meaning of section 501(c)(3) of the Code. Compare G.C.M. 22554, C.B. 1941-1, 243. But exemption will not be denied merely because the hospital maintains a prepayment plan, so long as such plan is available to all persons living in the area and so long as the hospital makes available its facilities to the indigent as well as to pay patients to the same extent as any other hospital not operated for profit.

A hospital which is organized as required by section 501(c)(3) of the Code, but which engages primarily in operations foreign to its stated purposes, cannot qualify as a charitable organization under that section. Conversely, a hospital, otherwise exempt, will not lose its exempt status by reason of engaging in operations unrelated to its stated pur-

poses if such operations may be considered as merely incidental. Such a hospital will, however, be required to file an income tax return, Form 990-T, U.S. Exempt Organization Business Income Tax Return, if its gross income (included in computing unrelated business taxable income) for the taxable year is $1,000 or more.

APPENDIX C

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1378-71

EASTERN KENTUCKY WELFARE RIGHTS ORGANIZATION, ET AL., PLAINTIFFS

v.

GEORGE P. SHULTZ, ET AL., DEFENDANTS

DEFENDANTS' PROGRESS REPORT OF ACTION TAKEN TO IMPLEMENT THIS COURT'S ORDER OF JANUARY 29, 1974

Pursuant to the direction in this Court's Order and Judgment filed January 29, 1974, Defendants enclose a proposed Revenue Ruling and a proposed Revenue Procedure which reflect the Internal Revenue Service's progress in the direction of implementing this Court's Order.

DATED: APRIL 1, 1974.

/s/ John J. McCarthy
JOHN J. MCCARTHY, Chief
General Litigation Section
Tax Division
U. S. Department of Justice
Washington, D.C. 20530

/s/ Donald J. Gavin
DONALD J. GAVIN
Trial Attorney
Tax Division
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Of Counsel:

EARL J. SILBERT
United States Attorney

[Certificate of Service Omitted]

Control No. 74-3-05623

PART I

SECTION 501.—EXEMPTION FROM TAX ON CORPORATIONS, CERTAIN TRUSTS, ETC.

26 CFR 1.501(c)(3)-1: Organizations organized and operated for religious, charitable, scientific, testing for public safety, literary, or educational purposes, or for the prevention of cruelty to children or animals.

Rev. Rul.

The purpose of this revenue ruling is to comply with the order of the United States District Court for the District of Columbia entered January 29, 1974 in *Eastern Kentucky Welfare Rights Organization* v. *Shultz*, —— Fed. Supp. —— (D. D.C. 1974), relating to the position of the Internal Revenue Service respecting the qualification of a nonprofit hospital as a charitable organization for federal income tax purposes under Rev. Rul. 69-545, 1969-2 C.B. 117. The court held that the action of the Service in that revenue ruling in modifying its position with respect to the charitable qualification of nonprofit hospitals previously enunciated in Rev. Rul. 56-185, 1956-2 C.B. 202, was void and without effect, and directed the Service, among other things, to reinstate the requirement of Rev. Rul. 56-185 relating to the treatment of indigent patients.

The opinion and order of the court are presently on appeal by the government to the United States

Court of Appeals for the District of Columbia Circuit, *Eastern Kentucky Welfare Rights Organization* v. *Shultz*, D.C. Cir. #74-1293, and accordingly the requirements stated in this Rev. Rul. and in Rev. Proc. ——, page —— of this Bulletin may be modified as a result of appellate review.

In Rev. Rul. 56-185, 1956-1 C.B. 202 the Service held that to qualify as a charitable organization described in section 501(c)(3) a nonprofit hospital must, among other requirements, be operated to the extent of its financial ability for those not able to pay for the services rendered and not exclusively for those who are able and expected to pay.

In Rev. Rul. 69-545, 1969-2 C.B. 117 the Service modified the above requirement of Rev. Rul. 56-185 as an absolute condition of exemption. It held that under certain circumstances a nonprofit hospital may be operating in such a way as to confer a sufficiently broad community benefit in the charitable sense that it will qualify as a charitable organization under section 501(c)(3) of the Code, notwithstanding the fact that it does not care for indigent patients without charge or at rates below cost.

On the basis of its decision in *Eastern Kentucky* regarding the invalidity of the Service's action in Rev. Rul. 69-545, the court entered an order dated January 29, 1974 enjoining the Secretary of the Treasury and the Commissioner of Internal Revenue from:

> Granting tax exempt status under section 501 (c)(3) and allowing deductions for contributions

under section 170(a)-(c) to private nonprofit hospitals unless and until said hospitals:

a. Satisfy the requirements found in Revenue Ruling 56-185, in particular, that they:

> (1) be operated, to the extent of their financial ability, for those not able to pay for services and not exclusively for those who are able and expected to pay; (2) furnish the above "charitable" services on a reduced rate and below cost or no charge basis; (3) not refuse patients in need of hospital care who cannot pay.

b. Conspicuously post, in appropriate accessible public areas, notice, to be prepared by the defendants and subject to Court approval, which shall include:

> (1) That the hospital has applied for or has been granted tax exempt status under § 501(c)(3) of the Code; (2) An intelligible recitation of the previously mentioned provisions of Revenue Ruling 56-185.

The practical effect of the court's opinion and order is to nullify the holding of Rev. Rul. 69-545. In compliance with the court's order, therefore, Rev. Rul. 69-545 is hereby suspended and the requirements of Rev. Rul. 56-185 are reinstated, particularly with respect to the requirement of that ruling that a hospital must:

. . . be operated to the extent of its financial ability for those not able to pay for the services rendered and not exclusively for those who are able to and expected to pay. It is normal for hospitals to charge those able to pay for services rendered in order to meet the operating expenses of the institution, without denying medical care or treatment to others unable to pay. The fact that its charity record is relatively low is not conclusive that a hospital is not operated for charitable purposes to the full extent of its financial ability. It may furnish services at reduced rates which are below cost, and thereby render charity in that manner. It may also set aside earnings which it uses for improvements and additions to hospital facilities. It must not, however, refuse to accept patients in need of hospital care who cannot pay for such services. Furthermore, if it operates with the expectation of full payment from all those to whom it renders services, it does not dispense charity merely because some of its patients fail to pay for the services rendered.

Also, in accordance with the court's order, to qualify for recognition or continued recognition of exemption as an organization described in section 501(c)(3) and as an organization contributions to which are deductible under section 170 of the Code, a nonprofit hospital must post the notice directed by the court and prescribed in Rev. Proc. —, page — of this Bulletin.

Under the authority granted by section 7805(b) of the Code, this revenue ruling will not be applied prior to ————————, the date of its publication in the Internal Revenue Bulletin, with respect to nonprofit hospitals that have been relying upon rulings or determination letters recognizing their exempt status as organizations described in section 501(c)(3) of the Code.

Control No. 74-3-05622

PART V

ADMINISTRATIVE, PROCEDURAL, AND MISCELLANEOUS MATTERS

26 CFR 601.201: Rulings and determination letters. (Also Part I, Section 501; 1.501(a)-1.)

Rev. Proc.

SECTION 1. PURPOSE

This Revenue Procedure discusses the requirements ordered by the court in *Eastern Kentucky Welfare Rights Organization* v. *Shultz*, —— F. Supp. —— (D. D.C. 1974) with respect to the Internal Revenue Service's recognition of exemption of nonprofit hospitals under section 501(c)(3) of the Internal Revenue Code of 1954 and the deductibility under section 170 of contributions to such hospitals. See Rev. Rul. 74- ——, page —, of this Bulletin.

SEC. 2. BACKGROUND

.01 The United States District Court for the District of Columbia in the *Eastern Kentucky* case, *supra* has ordered the Internal Revenue Service to reinstate certain provisions of Rev. Rul. 56-185, 1956-1 C.B. 202 which were modified in Rev. Rul. 69-545, 1969-2 C.B. 117, and has enjoined the Service from recognizing the exempt status under section 501(c)(3) of the Code and from allowing deductions for contributions under section 170 to hospitals that do not post notice in "appropriate accessible public areas" that:

1. The hospital has applied for exemption or has been recognized as exempt under section 501(c)(3) of the Code; and

2. as a tax exempt hospital it must provide care to indigent patients without charge or below cost to the extent required by Rev. Rul. 56-185 as reinstated by 74-———.

.02 The provision of Rev. Rul. 56-185, *supra*, reinstated by Rev. Rul. 74-———, provides as one of the requirements of qualification as a charitable organization described in section 501(c)(3) that a hospital must:

> ". . . be operated to the extent of its financial ability for those not able to pay for the services rendered and not exclusively for those who are able to and expected to pay. It is normal for hospitals to charge those able to pay for services rendered in order to meet the operating expenses

of the institution, without denying medical care or treatment to others unable to pay. The fact that its charity record is relatively low is not conclusive that a hospital is not operated for charitable purposes to the full extent of its financial ability. It may furnish services at reduced rates which are below cost, and thereby render charity in that manner. It may also set aside earnings which it uses for improvements and additions to hospital facilities. It must not, however, refuse to accept patients in need of hospital care who cannot pay for such services. Furthermore, if it operates with the expectation of full payment from all those to whom it renders services, it does not dispense charity merely because some of its patients fail to pay for the services rendered."

SEC. 3. PROCEDURES FOR RECOGNITION OF EXEMPTION AND DEDUCTIBILITY OF CONTRIBUTIONS FOR HOSPITALS

.01 The above requirement of rendering care to the extent of its financial ability to those not able to pay for the service will apply to hospitals seeking recognition of exemption under section 501(c)(3) of the Code and to hospitals that have been recognized as exempt thereunder.

.02 Hospitals applying for recognition of exempt status under section 501(c)(3) of the Code will be denied such recognition if they do not agree to post the required notice provided by Section 4. In the case of hospitals that have been recognized as exempt under section 501(c)(3), refusal to post the

required notice provided by Section 4 in accordance with the terms of this revenue procedure will result in revocation of recognition of exemption under section 501(c)(3).

.03 The treatment of contributions will be governed by the usual procedures respecting deductibility of charitable contributions, as set out in Rev. Proc. 72-39, 1972-2 C.B. 818, which provides in part as follows:

> Where an organization listed in Publication No. 78 ceases to qualify as an organization contributions to which are deductible under section 170 of the Code and the Service subsequently revokes a ruling or a determination letter previously issued to it, contributions made to the organization by persons unaware of the changes in the status of the organization generally will be considered allowable if made on or before the date of publication of the Internal Revenue Bulletin announcing that contributions are no longer deductible. However, the Service is not precluded from disallowing a deduction for any contribution made after an organization ceases to qualify under section 170, where the contributor (1) had knowledge of the revocation of the ruling or determination letter, (2) was aware that such revocation was imminent, or (3) was in part responsible for, or was aware of, the activities or deficiencies on the part of the organization that gave rise to the loss of qualification.

SEC. 4. THE NOTICE

.01 The notice is a statement of the hospital's commitment to care, to the extent of its financial ability to do so, for patients who cannot afford to pay for medical services, and is intended to inform the public of this commitment. The notice must be printed on heavy white paper or white cardboard at least one foot square. The notice must be printed in black 24 point medium bold type face. The notice must be captioned and read as follows:

NOTICE OF CHARITABLE SERVICES

THIS HOSPITAL HAS BEEN RECOGNIZED AS EXEMPT (OR IS SEEKING RECOGNITION OF EXEMPTION) FROM FEDERAL INCOME TAX AS A CHARITABLE ORGANIZATION. ALTHOUGH IT IS NECESSARY TO CHARGE THOSE ABLE TO PAY FOR SERVICES RENDERED IN ORDER TO MEET OUR OPERATING EXPENSES, TO THE EXTENT OF OUR FINANCIAL ABILITY WE DO NOT DENY MEDICAL TREATMENT TO THOSE UNABLE TO PAY ALL OR PART OF OUR CHARGES FOR SUCH SERVICES

.02 Where appropriate, the Service may advise hospitals that they must post a translation of this notice in a foreign language. Usually, this will occur where a hospital serves a community with a substantial number of non-English speaking residents.

.03 This notice must be permanently posted in the public areas of a hospital's admissions office, emergency room, business or credit office, and lobby so as to be clearly visible to the public.

.04 The notice must be posted within a reasonable period of time after ————————, the date of publication of this revenue procedure in the Internal Revenue Bulletin. Normally, ninety days will be deemed a reasonable period of time.

Assistant Commissioner
(Technical)

APPENDIX D

IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1378-71

EASTERN KENTUCKY WELFARE RIGHTS ORGANIZITION, ET AL., PLAINTIFFS

vs.

GEORGE P. SHULTZ, ET AL., DEFENDANTS

CERTIFICATE OF SERVICE

Copies of the Plaintiffs' Response to Defendants' Progress Report of Action Taken to Implement This Court's Order of January 28, 1974 have been served by first class mail upon all counsel of record in the above proceeding on April 10, 1974.

/s/ Marilyn G. Rose
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IN THE UNITED STATES DISTRICT COURT
FOR THE DISTRICT OF COLUMBIA

Civil Action No. 1378-71

EASTERN KENTUCKY WELFARE RIGHTS ORGANIZATION, ET AL., PLAINTIFFS

vs.

GEORGE P. SHULTZ, ET AL., DEFENDANTS

PLAINTIFFS' RESPONSE TO DEFENDANTS' PROGRESS REPORT OF ACTION TAKEN TO IMPLEMENT THIS COURT'S ORDER OF JANUARY 28, 1974

In the Order of this Court of January 28, 1974, Defendants were ordered to

> "take the necessary and immediate steps to implement this order, including but not limited to revoking the voided portion of Revenue Ruling 69-545 and promulgating in its stead appropriate Rulings, and shall report their progress to the Court within 60 days of the entry of this Order, and at such further time as the Court deems necessary."

On April 1, 1974, Defendants filed a proposed Revenue Ruling and a proposed Revenue Procedure to "reflect the Internal Revenue Service's progress in the direction of this Court's Order." These documents do the following:

(1) The proposed ruling, after reciting the history of the litigation and the Order, suspends Rev.Rul. 69-545 and reinstates the requirements of Rev.Rul. 56-

185, in particular, the section of the latter that a hospital must "be operated to the extent of its financial ability for those not able to pay for the services rendered and not exclusively for those who are able to and expected to pay." The proposed ruling also includes the requirement of a posting of a Notice (as set forth in the Order of this Court), and provides that it will not be applied prior to the date it appears in the Internal Revenue Bulletin.

(2) The Revenue Procedure involves the procedures under which hospitals will be recognized as eligible for § 501(c) (3) status and contributions to them will be recognized deductible under § 170(a)-(c). Basically it restates the requirement that hospitals render care to the extent of their financial ability for those not able to pay, and that they post a Notice of the hospital's commitment as a condition of obtaining and maintaining such tax exemption status. The Notice itself is set forth, and states as follows:

NOTICE OF CHARITABLE SERVICES

THIS HOSPITAL HAS BEEN RECOGNIZED AS EXEMPT (OR IS SEEKING RECOGNITION OF EXEMPTION) FROM FEDERAL INCOME TAX AS A CHARITABLE ORGANIZATION. ALTHOUGH IT IS NECESSARY TO CHARGE THOSE ABLE TO PAY FOR SERVICES RENDERED IN ORDER TO MEET OUR OPERATING EXPENSES, TO THE EXTENT OF OUR FINANCIAL ABILITY WE DO NOT DENY MEDICAL TREATMENT TO THOSE UNABLE TO PAY ALL OR PART OF OUR CHARGES FOR SUCH SERVICES.

Plaintiffs believe that these proposed actions are inadequate, and do not meet the Order of this Court.

(1) *The Inadequacy of Enforcement*

Whether or not hospitals were abiding by the requirements set forth in Revenue Ruling 56-185 prior to October of 1969, they have been freed of such obligations since that date. Plaintiffs believe that more has to be done to obtain compliance, that objective standards should be set forth under which compliance would be judged, and that enforcement should be developed, to correct the effects of the policy which this Court voided.

With respect to standards, the cases out of which Revenue Ruling 56-185 developed generally found 1-3% of gross revenues inadequate and 5-8% adequate. More recently, HEW, when faced with setting standards by which hospitals constructed with Federal Hill-Burton moneys, first proposed a standard of 5% of cost of operations or 25% of net profits, whichever was greater (37 Fed.Reg.No.75, April 18, 1972), and later after comments from hospitals and poor people set a "compromise" of 3% of cost of operations or 10% of the Hill-Burton grant, whichever was the lesser (37 Fed.Reg.No.142, July 22, 1972). It would be more meaningful if IRS directed itself to setting objective measures of compliance to guide both poor people and hospitals.

With respect to enforcement, in the first place, the Notice is inadequate to tell a poor person *whether* he is eligible for free and below cost service, *whether*

the hospital is financially able to serve him, and *to whom* he complains if he has been denied free or below cost care. Certainly, at a minimum (aside from developing standards) the person denied free care should know where to lodge a complaint (e.g., the local office of Internal Revenue).

Secondly, IRS operates on a self-policing system, i.e., the taxpayer reports his gross income, his net (i.e., taxable) income, and his liability. Hospitals which have 501(c)(3) status file annual reports (the form 990). IRS has already indicated some change in Form 1023 (which is the application form for 501(c)(3) status) which contains some questions directed to the service of a 501(c)(3) hospital. It would appear to be most appropriate for IRS to develop questions, directed toward ascertaining: the hospital's gross revenues, its cost of operations, its "free service" (specifically excluding its "bad debts"), total number of inpatients and total number of free inpatients. These questions should be added to Form 990 for 1974 reports (due in 1975) and for later years.

(2) *The Total Voiding of 69-545*

Whereas in the enforcement area IRS has done too little in the revocation area it may have done too much. IRS has contended in this Court that participation in governmental programs such as Medicare and Medicaid and the maintenance of an open emergency room are requirements of "charitable" tax status, and that 69-545 so requires. Although there

is some ambiguity in the Ruling is this regard, IRS has not spelled out these requirements elsewhere. Further, Plaintiffs do not challenge such requirements, nor do we read the Court's decision and order as voiding them. Indeed, the language of the Order, quoted above, directs IRS "to revoking the voided portion of Revenue Ruling 69-545." We believe that the more acceptable approach would have been to have limited revocation as directed by the Court or to have incorporated the unchallenged portions of 69-545 in the new Revenue Ruling.

In conclusion, Plaintiffs request the Court to direct Defendants to develop more specific standards, and a more effective enforcement mechanism, and to limit themselves to voiding only what the Court has voided.

Respectfully submitted,

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